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*Attorneys for Plaintiff State of Oregon*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION**

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FEDERAL TRADE COMMISSION,  
STATE OF ARIZONA,  
STATE OF CALIFORNIA,  
DISTRICT OF COLUMBIA,  
STATE OF ILLINOIS,  
STATE OF MARYLAND,  
STATE OF NEVADA,  
STATE OF NEW MEXICO,  
STATE OF OREGON, and  
STATE OF WYOMING,

Plaintiffs,  
v.

THE KROGER COMPANY and  
ALBERTSONS COMPANIES, INC.,

Defendants.

Case No. 3:24-cv-00347

**REPLY IN SUPPORT OF PLAINTIFF  
STATES' MOTION FOR AWARD OF  
ATTORNEY'S FEES AND COSTS**

In opposing the States' motion for attorney's fees, Defendants ignore what they dislike. They argue that *Lackey v. Stinnie* forecloses the States' petition. But they miss the important distinction between statutes that award attorney's fees to "prevailing" parties from those—like the Clayton Act—that award fees to a plaintiff that "substantially prevails." And they do not address the many Supreme Court cases the States cited explaining why that difference matters. Next, Defendants contend that the States did not bring a claim under the Clayton Act. But they ignore that (1) the Complaint states that each State is bringing the action "pursuant to Section 16 of the Clayton Act," Compl. at 7–9 ¶¶ 17–26, ECF No. 3-2, (2) this Court's order states explicitly that the States did exactly that, and (3) their own state-court filings affirm the same. These oversights fatally undermine Defendants' Opposition. Accordingly, the Court should award the States' reasonable attorney's fees.

**I. Supreme Court precedent establishes the material difference between the "substantially prevails" and "prevailing party" standards.**

Defendants first contend that (1) *Lackey v. Stinnie* requires this Court to deny the States' petition and (2) any contrary holding would violate Ninth Circuit precedent. Defs.' Opp. to Pl. States' Mot. for Att'y's Fees at 5–13, ECF No. 569 ("Opp.") (discussing *Lackey v. Stinnie*, 145 S. Ct. 659 (2025)). But the former argument rests solely on a misleading reading of *Lackey*'s dissent—rather than its majority—and the latter contorts precedent into a rule inconsistent with itself, Ninth Circuit authority, and Supreme Court precedent. Both are wrong.

**A. Contrary to Defendants' reading, *Lackey* distinguishes the "substantially prevails" and "prevailing party" standards.**

Defendants' argument rests on the flawed notion that "substantially" is meaningless when it comes to fee awards under the Clayton Act for a plaintiff who "substantially prevails." On that point, *Lackey* provides them no assistance. *Lackey*'s holding addressed only the "prevailing

party” standard, not the Clayton Act’s “substantially prevails” standard. The Supreme Court made clear that the two are not the same. The *Lackey* Court—citing the Freedom of Information Act (“FOIA”), which awards fees to a plaintiff who has “substantially prevailed” even if “through ‘a voluntary or unilateral change in position by the agency’”—explained that when Congress wants a different standard to apply, it uses different language. 145 S. Ct. at 670 (quoting 5 U.S.C. § 552(a)(4)(E)). Defendants argue that the distinction is irrelevant because FOIA states that a voluntary change in agency position meets this standard. But the States never argued that the FOIA and Clayton Act standards were identical, only that the key qualifying term “substantially” has a distinct meaning from “prevailing party” statutes like the one *Lackey* addressed. *Lackey* emphasized that point when it quoted both FOIA’s “substantially prevailed” standard and the statutorily defined circumstances that meet it. This construction follows the Court’s past admonitions that “statutes contain varying standards as to the precise degree of success necessary for an award of fees,” *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983), and “not to apply [prevailing party] rules applicable under one statute to a different statute without careful and critical examination,” *Hardt v. Reliance Std. Life Ins.*, 560 U.S. 242, 253–54 (2010) (quoting *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009)). See also Pl. States’ Mot. for Award of Att’y’s Fees & Costs at 10, ECF No. 563 (“Mot.”). Defendants ignore both cases.

Disregarding the Supreme Court decisions that distinguish these varying statutory standards, Defendants misleadingly claim the *Lackey* dissent concluded that, under *any* fee-shifting regime, “it is no longer ‘possible for a party to prevail based on a preliminary ruling’ unless a federal statute abrogates the ‘finality’ requirement.” Opp. at 6 (quoting *Lackey*, 145 S. Ct. at 675 (Jackson, J., dissenting)). But that quote was limited to section 1988 and “the legal term of art that Congress actually chose” for that section. *Lackey*, 145 S. Ct. at 675 (Jackson, J.,

dissenting). It does not address other statutes with other standards, much less import a “finality” requirement into them. *Id.* Even if the dissent were binding—which it obviously is not, *cf. Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir. 2022) (“Dissenting opinions cannot be considered when determining the holding of a fractured Supreme Court decision[.]”—it has no bearing on whether a plaintiff substantially prevails under the Clayton Act.

**B. The context and reasoning of pre-*Lackey* precedent confirms that a preliminary injunction still satisfies the “substantially prevails” standard.**

Defendants incorrectly suggest that pre-*Lackey* Ninth Circuit decisions equating “prevailing party” with “substantially prevails” import *Lackey*’s holding into “substantially prevails” statutes. Opp. at 10–11. But pre-*Lackey* Ninth Circuit decisions held that a preliminary injunction met the “prevailing party” standard. *E.g.*, *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). Prior to *Lackey*, the Ninth Circuit applied a lower threshold to *both* standards. *Lackey* held only that the lower threshold does not apply to “prevailing parties”—not that it no longer applies to a plaintiff who “substantially prevails.” See Opp. at 10–11, 15.

Defendants also obfuscate the Ninth Circuit’s reasoning in *Southwest Marine*. There, the Ninth Circuit relied on the remedial purposes of the Clayton Act and its legislative history to conclude that a plaintiff “substantially prevails” when it obtains its relief sought, even absent permanent injunctive relief. *Sw. Marine, Inc. v. Campbell Indus.*, 732 F.2d 744, 746 (9th Cir. 1984). The Ninth Circuit observed that the Clayton Act’s legislative history “suggests that awards of attorney’s fees are essential if private attorneys-general are to enforce the antitrust laws.” *Id.* (citing H.R. Rep. 94-499(I), at \*18–20 (1975), reprinted in 1976 U.S.C.C.A.N. 2572, 2588–90, APP-308–10). The court reasoned that “[t]o permit defendants to avoid the award of attorney’s fees in suits for injunctive relief by ceasing their illegal conduct would reduce the incentive to bring suit, thereby frustrating Congress’s intent.” *Id.*

When *Southwest Marine* was decided, the catalyst theory provided a basis for “prevailing party” fees under 42 U.S.C. § 1988. *See Am. Const. Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981). Thus, the court in *Southwest Marine* reasonably chose to “apply the standard for determining a ‘prevailing party’ developed under section 1988 to awards under section 16,” under which “a plaintiff need not obtain formal relief to recover fees[;] . . . there must simply be a causal relationship between the litigation brought and the practical outcome realized.” 732 F.2d at 747. For civil rights cases, the Supreme Court repudiated the catalyst theory in 2001. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 600, 605 (2001). But beyond the Court’s discussion of FOIA in *Lackey*, the Supreme Court has not addressed the issue in the context of the Clayton Act or any other “substantially prevails” statute. To read *Southwest Marine* as applying the new section 1988 “prevailing party” standard to the Clayton Act—despite the fact that it predates both *Lackey* and *Buckhannon*—cannot be reconciled with the Ninth Circuit’s reasoning for doing so in the first place: to encourage enforcement of the antitrust laws and to prevent defendants from “avoid[ing] the award of attorney’s fees in suits for injunctive relief by ceasing their illegal conduct.” 732 F.2d at 746.

At the time, the Ninth Circuit had no reason to distinguish “prevailing party” from “substantially prevails” because it had already interpreted the former broadly. So it “infer[red] that Congress intended that the identical language in the [Clayton Act] section 16 and section 1988 attorney’s fees provisions be identically construed.” *Id.* But after *Southwest Marine* was decided, the Supreme Court concluded the “prevailing party” and “substantially prevails” were not, in fact, identical. *Ruckelshaus*, 463 U.S. at 684. And in *Lackey*, the Court emphasized how differences in statutory fee provisions have material impacts. 145 S. Ct. at 670. In light of these changed circumstances, this Court need not apply the new “prevailing party” standard to the

Clayton Act simply because the Ninth Circuit applied the old “prevailing party” standard to it decades ago. *See, e.g., Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc) (holding that “where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled” and applying this rule to district courts). Indeed, doing so would violate the Supreme Court’s guidance “not to apply rules applicable under one statute to a different statute without careful and critical examination.” *Hardt*, 560 U.S. at 253–54 (quoting *Gross*, 557 U.S. at 174).

In fact, the only interpretation of *Southwest Marine* not “clearly irreconcilable” with *Buckhannon*, *Hardt*, and *Lackey* entitles the States to fees. Both *Buckhannon* and *Lackey* addressed civil rights law’s “prevailing party” standard, not the Clayton Act’s “substantially prevails” standard. Neither expressly overruled the catalyst rule for antitrust fee petitions. Accordingly, the only way to reconcile *Southwest Marine* with intervening precedent is to apply its *entire* holding, that the States need only show “a causal relationship between the litigation brought and the practical outcome realized.” 732 F.2d at 746; *see also FTC v. Penn State Hershey Med. Ctr.*, 914 F.3d 193, 196 (3d Cir. 2019) (cited in Opp. at 14–20) (leaving open “whether the Supreme Court’s rejection of the catalyst theory controls claims for fees under Section 16 of the Clayton Act”). This interpretation reconciles *Southwest Marine* with *Lackey*, which addressed a different statute, with different language expressing congressional intent, arising under a different set of procedures and circumstances.

This focus on reasoning emphasizes why the similarity of this Court’s three-week evidentiary hearing to a full merits trial matters. Mot. at 12–14; Opp. at 12–13. The preliminary

injunction hearing in *Lackey* involved six witnesses and four exhibits and lasted just under 4.5 hours, nothing like the substantial hearing in this case which is typical of merger cases under the Clayton Act. That difference underscores the limited scope of *Lackey* and its impact on *Southwest Marine*. See Prelim. Inj. Hearing Tr. at 3–5, 193, *Stinnie v. Holcomb*, No. 3:16-CV-00044 (W.D. Va. Nov. 15, 2018), APP-84–86, 274.

Finally, Defendants argue that, if the word “substantially” modifies “prevailing” (it does), then it sets a higher bar for recovery (it does not). Defendants again ignore contrary Supreme Court precedent: *Pierce v. Underwood* interpreted “substantially” as “in substance” or “to a degree that would satisfy a reasonable person.” 487 U.S. 552, 565 (1988) (quoted in Mot. at 11). Dictionaries defined “substantially” nearly identically at the time Congress enacted Section 16. See *substantially*, Black’s Law Dictionary 1281 (5th ed. 1979) (“Essentially; without material qualification; in the main; in substance; materially; in a substantial manner.”), APP-297; *substantial*, Am. Heritage Dictionary 1213 (2d. coll. ed. 1982) (“Of, pertaining to, or having substance; material”), APP-320. Moreover, Congress enacted FOIA’s attorney’s fees provision a mere two years before adding identical language to the Clayton Act. Compare FOIA, amend., Pub. L. No. 93-502, 88 Stat. 1561 (1974), with Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976). Thus, *Pierce* provides context for the *Lackey* Court’s emphasis on both FOIA’s “substantially prevailed” and “voluntary or unilateral change” provisions. Defendants do not. Under their view, FOIA would nonsensically require both more success (prevailing and then prevailing substantially) and less (their so-called “finality” rule). But, consistent with contemporaneous definitions of the word “substantially,” *Lackey* assigns a

*lower* bar to FOIA fee petitions. So too does the Clayton Act require a different, lower showing of success—one that entitles the States to fees.<sup>1</sup>

**II. This Court and Defendants recognized that the States brought a claim under the Clayton Act—one which did not preclude future enforcement by the States.**

The Complaint clearly alleges that the States are enforcing the Clayton Act. In doing so, the States carefully preserved further enforcement throughout the merger process, if necessary. Essentially, Defendants argue that *Penn State Hershey* and *Staples* apply here. Opp. at 14–17. But these out-of-circuit cases conflict with binding Ninth Circuit precedent and the plain language of Section 16 itself. *See* Mot. at 15–23. To remedy this, Defendants claim that the States did not bring or allege *any* claim under the Clayton Act and thus they cannot prevail under the Clayton Act. *E.g.*, Opp. at 20. But that is simply not true. In the Complaint, each State alleged that it was bringing claims “pursuant to Section 16 of the Clayton Act.” Compl. ¶¶ 17–26. One need not read past the first line of the Court’s opinion to rebuff this argument:

Plaintiffs Federal Trade Commission (“FTC”), the District of Columbia, and the States of Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming bring this action pursuant to the Federal Trade Commission Act, 15 U.S.C. § 53(b), and the *Clayton Act*, 15 U.S.C. § 26, against defendants Kroger Company (“Kroger”) and Albertsons Companies, Inc. (“Albertsons”), seeking to enjoin a proposed merger of the two companies.

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<sup>1</sup> Defendants assert without authority that “to substantially prevail, a plaintiff must first ‘prevail.’” Opp. at 13. They allude to dicta in *Kasza v. Whitman*, that the plaintiff “is not a ‘prevailing party’ (and thus cannot be a substantially ‘prevailing party’).” 325 F.3d 1178, 1180 (9th Cir. 2003). But *Kasza* relied on *Buckhannon*’s requirement of “a material alteration of the legal relationship of the parties.” *Id.* The prevailing/substantially prevails distinction did not control the holding. *See id.* Thus, the Court need not follow this unexplained dicta. *Cetacean Cnty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (statement “unnecessary to the decision in the case” or not both “germane to the eventual resolution of the case, and resolve[d] . . . after reasoned consideration,” is non-binding dictum (quoting *Best Life Assur. v. CIR*, 281 F.3d 828, 834 (9th Cir. 2002), and *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)). Moreover, one can read *Kasza* to say the two standards were the same.

Op. & Order at 1, ECF 521 (emphasis added). Moreover, the Opinion's first section explains the States' underlying Clayton Act claim. *Id.* at 1–2.

In fact, Defendants asserted in the Washington action that “[t]he FTC, eight other states, and the District of Columbia jointly sued to enjoin this same transaction *under the Clayton Act.*”<sup>2</sup> And in the Colorado action, Defendants explained that “the FTC, joined by eight states and the District of Columbia, sued Kroger and Albertsons (but not C&S) in the District of Oregon to enjoin the transaction *under Section 7 of the Clayton Act.*”<sup>3</sup> Until now, Defendants agreed that the States sought an injunction under the Clayton Act.

Indeed, the States have consistently affirmed that they sought relief under the Clayton Act. See Mot. at 23 n.12 (collecting examples). For instance, the Complaint alleges that the merger would violate Section 7 of the Clayton Act (i.e., the “claim”) and that “[s]ection 16 of the Clayton Act, 15 U.S.C. § 26, authorize[d] the Plaintiff States to sue for and have injunctive relief to prevent threatened loss or damage from Defendants’ consummation of the proposed acquisition” (i.e., the statutory right of action). Compl. ¶¶ 118–20. Similarly, Defendants’ Answers admitted that each State brought “this action on behalf of the State pursuant to Section 16 of the Clayton Act” and “is seeking relief pursuant to Clayton Act § 16.” Compl. ¶¶ 17–26; Albertsons Cos., Inc. Answer & Aff. Defs. to Compl. ¶¶ 17–26, ECF No. 91 (“Albertsons admits that Plaintiff States have brought this action as described in Paragraph 26[.]”); Kroger Co.’s Answer & Aff. Defs. at 7–8 ¶¶ 17–26, ECF No. 90 (admitting same). Defendants confuse the

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<sup>2</sup> Reply in Supp. of Defs.’ Mot. to Dismiss at 2, *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Sup. Ct. Apr. 17, 2025) (“Defs.’ Wash. Reply”) (emphasis added), APP-276.

<sup>3</sup> Defs.’ Opp. to State of Colo.’s Mot. for Prelim. Inj. at 25, *Colorado v. Kroger Co.*, No. 2024CV30459 (Dist. Ct. Colo. June 26, 2025) (“Defs.’ Colo. Opp.”) (emphasis added), APP-37.

standard of review applied with the States' claim and right to sue.<sup>4</sup>

This mistake alone dooms the rest of Defendants' Opposition. Defendants attempt to distinguish *Doe I–10 v. Fitzgerald* by arguing that "Plaintiffs brought no claims under the Clayton Act." Opp. at 18 (citing 102 F.4th 1089, 1091 (9th Cir. 2024)). Similarly, Defendants argue that *Maher v. Gagne* does not apply because "there is no 'pendent' Clayton Act claim," Opp. at 19 (citing 448 U.S. 122 (1980))—but again, this Court has recognized that there is.<sup>5</sup> The States could not—and did not—bring any federal claim except under the Clayton Act; the FTC Act does not provide the States a right of action. *See* 15 U.S.C. § 53; *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974) ("[T]he provisions of the Federal Trade Commission Act may be enforced only by the Federal Trade Commission.").

Further, Defendants misrepresent *ADT Security Services v. Lisle Woodridge Fire Protection District*: There, the plaintiffs sued under the Clayton Act but obtained an injunction through the court adjudicating their state-law—not their antitrust—claims. 86 F. Supp. 3d 857, 861 (N.D. Ill. 2015). Although "[Plaintiffs'] constitutional and antitrust theories of relief went unadjudicated," the court held that Section 16 of the Clayton Act authorized fees. *Id.* at 866–67.

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<sup>4</sup> Defendants cite the lack of a bond as distinguishing the Clayton and FTC Acts, thereby barring the States' fee claim. It does not. Courts often eschew a bond for "[a]n attempt to enforce compelling public interests"—particularly merger challenges. *Washington v. Texaco Ref. & Mktg. Inc.*, No. C91-39R, 1991 WL 47081, at \*3 (W.D. Wash. Jan. 11, 1991) (collecting cases), APP-294. Further, to obtain a bond, a defendant must request one and prove a likelihood of harm. *fuboTV Inc. v. Walt Disney Co.*, 745 F. Supp. 3d 109, 151 & n.42 (S.D.N.Y. 2024). Defendants did not do so here. The absence of a bond means nothing.

<sup>5</sup> Putting aside what case *Carreras v. City of Anaheim* technically interpreted, its fee-shifting standard binds this court. 768 F.2d 1039, 1050 (9th Cir. 1985) (citing *Gagne v. Maher*, 594 F.2d 336, 339–40 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980)). Defendants do not challenge the binding legal rules in *Carreras*. Opp. at 19–20. Instead, they rely solely on the incorrect contention that "Plaintiffs never alleged any pendent Clayton Act claim at all." Opp. at 20.

Finally, Defendants portray the States as free-riders who should have prosecuted this suit under the Clayton Act standards alone, thus—in whole or in part—separately from the FTC. But this is the *opposite* tack they took with Washington and Colorado, each of whom they asked to join this case. Defs.’ Wash. Reply, Ex. A at 1, APP-288; Defs.’ Colo. Opp. at 25, APP-37. Defendants lauded this case as “provid[ing] an efficient forum for all interested parties.” Defs.’ Wash. Reply at 5, APP-280. They explained that “[l]itigating all antitrust challenges to the Kroger-Albertsons merger in a single proceeding will benefit all parties, . . . [including] avoid[ing] unnecessary and duplicative litigation.” *Id.*, Ex. A at 2, APP-289. As to efficiency, the States agree: In an example of federalism at its finest, the States deferred to the FTC’s procedure, seeking injunctive relief pending the administrative hearing. But should something have interrupted this procedure—e.g., Kroger’s challenge to the FTC procedure’s constitutionality—the States could have moved to convert the preliminary injunction into a permanent one. The States anticipated this possibility, asking the Court to retain jurisdiction until the administrative proceeding had concluded and to “award such other and further relief as the Court may determine is appropriate, just, and proper.” Compl. at 46 ¶ 124(e). Contrary to their earlier desire to avoid “unnecessary and duplicative litigation,” Defendants now contend that, to seek fees, the States should have sought a permanent injunction that this Court would have decided in parallel with the FTC’s administrative hearing. Defendants cannot have it both ways. No argument justifies denying the States fees for choosing—as Defendants put it—the “efficient” path.

\* \* \*

Defendants ignore the plain language of the Clayton Act, binding Supreme Court and Ninth Circuit precedent, this Court’s Opinion, and even their own related state-court filings. Taken together, these all point to the same conclusion: The States are entitled to fees.

Dated: April 18, 2025

Respectfully submitted,

/s/ Tim D. Nord

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CERTIFICATE OF SERVICE

I certify that on the date noted below, I caused a true and correct copy of the Reply in support of Plaintiff States' Motion for Award of Attorney's Fees and Costs to be served upon the parties of record through the Court's ECF system.

Dated: April 18, 2025

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/s/ Christopher J. Kayser

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<p>pDISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p>DATE FILED: June 26, 2024 10:45 PM FILING ID: F6F174D7DAD3A CASE NUMBER: 2024CV30459</p>
<p>STATE OF COLORADO <i>ex rel.</i> PHILIP J. WEISER, Attorney General,</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiff, v.</p>	<p>Case Number: 2024CV30459 Div.: 414 Ctrm.:</p>
<p>THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&amp;S WHOLESALE GROCERS, LLC, Defendants.</p>	
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**DEFENDANTS' OPPOSITION TO THE STATE OF COLORADO'S MOTION  
FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

The Kroger Co.’s acquisition of Albertsons Companies, Inc. will benefit consumers nationwide, providing Coloradans with lower prices and better shopping experiences at their local grocery stores. As part of the merger, Kroger will invest billions of dollars into price investments, capital improvements, and associate wages and benefits at Albertsons stores nationwide. It will ensure that no stores close as a result of the merger, that all frontline associates will remain employed, that existing collective bargaining agreements will continue, and that associates will continue to receive industry-leading health care and pension benefits. It will improve consumers’ and employees’ experiences immediately, and for years into the future.

The Colorado Attorney General’s lawsuit asks this Court to deprive the entire country of those benefits by enjoining the \$24.6 billion merger in its entirety. But the State’s Motion for a Preliminary Injunction (“Mot.”) attacks a transaction that does not—and will never—exist. Specifically, both the State’s Motion and its recently filed expert report completely fail to address the real-world implications of Defendants’ April 22, 2024 Amended Divestiture Agreement. Pursuant to that Agreement, Kroger will acquire *just 14 stores* in Colorado, meaning Kroger will divest almost the entirety of Albertsons’ Colorado-based operations to C&S Wholesale Grocers, LLC (“C&S”), a family-owned business with more than 100 years of operational experience in the grocery industry. The Amended Divestiture Agreement ensures that C&S will compete rigorously with Kroger after the merger.

C&S is an ideal candidate to provide that competition. C&S is the supplier to more than 7,500 grocery stores, retail chain stores, and military bases nationwide; it operates under multiple store names (known as “banners”), including “Piggly Wiggly” and “Grand Union”; and it was approved by the Federal Trade Commission (“FTC”) as a divestiture buyer in a recent grocery

transaction. In addition to its wholesale and retail operations, C&S provides a comprehensive suite of services to its customers—from retail development to digital marketing and private brand support—demonstrating that C&S knows what it takes to run a successful grocery store. C&S also has the necessary capital: It is the eighth-largest privately owned company in the country, with net revenues in the 2023 fiscal year of [REDACTED], and it has agreed to invest more than \$2.9 billion in purchasing Albertsons’ assets. The State’s scattershot and speculative attacks on C&S provide no basis for this Court to second-guess C&S’s reasoned business judgment.

Merger litigation requires this Court to predict how the merger will affect competition in the future. In Colorado, the post-merger competitive landscape will not reduce the number of grocery options available to Coloradans. In the 14 Albertsons stores that Kroger will acquire, consumers will see an improved shopping experience, with lower prices, fresher produce, and better customer service. And in the stores that will be divested to C&S, consumers will walk into Albertsons stores (mostly Safeways) run by an enthusiastic and well-capitalized new owner with an expansive supply-chain network and more than a century of experience in the grocery industry. The State’s predictions of competitive harm in the post-merger world flatly ignore that reality.

The State ignores the market realities of today’s grocery industry as well. The State’s theory of harm rests on an antiquated image of suburban consumer behavior, in which a single member of each household goes on a weekly shopping trip to buy all their family’s groceries and household goods, from “soaps” to “paper goods,” to “wine, beer, and/or distilled spirits,” spending the family’s entire grocery budget at a single store. Mot. 4-5. But the State’s depiction finds no support in real-world consumer behavior. To the contrary, the data shows that the average household takes 2.6 trips to the grocery store per week; that less than 7% of customers shop at a

single store for their groceries; and that consumers are purchasing their groceries and household goods from a wide variety of online and brick-and-mortar retailers.

In today’s landscape, this merger will ensure the continuation of robust competition in the grocery industry, both in Colorado and across the United States. The merger will allow Kroger to better compete with global behemoths like Walmart, the nation’s largest grocery retailer and the biggest company by revenue in the United States; with Costco, the twelfth-largest company in the country, which has grown exponentially over the past decade while increasing its grocery selection; and with Amazon, the multinational powerhouse, which has leapt into the grocery space through its massive online grocery platform, its acquisition of Whole Foods, and the launch of its Amazon Fresh business. These Fortune 15 companies (and others) are laser-focused on the grocery retail market: Groceries provide Walmart with “most of its U.S. revenue,” and it “competes fiercely” with grocery retailers, “including discounters like Aldi and traditional grocers such as Publix and Kroger.” Sarah Nassauer, *Walmart’s Reign as America’s Biggest Retailer Is Under Threat*, Wall Street Journal (May 15, 2024) (Ex. 1).<sup>1</sup> At the same time, “Amazon could grab up to 20% of the U.S. grocery market by 2030.” *Id.* Simply put, modern competition for groceries and “household goods” extends far beyond Kroger and Albertsons, and the State fails to confront that reality.

\* \* \* \*

For a host of reasons, this Court should deny the Motion. The State has a heavy burden to show that it is entitled to the “extraordinary relief” of a preliminary injunction, *Rathke v. MacFarlane*, 648 P.2d 648, 654 (Colo. 1982), and it plainly has not carried that burden.

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<sup>1</sup> All references to exhibits are attached to the Declaration of Randall H. Miller, filed concurrently with this submission. Citations to the C&S Amended Divestiture Agreement (“Am. C&S Agreement”) refer to the submission filed under seal with this Court on May 17, 2024.

To begin, the State fails to establish the foundational elements of an antitrust claim challenging a merger: a well-defined (1) product market and (2) geographic market in which to assess competition. The State’s suggested product market delineates different categories of competitors (*i.e.*, mass merchandisers, club stores, natural grocers) then excludes those categories *entirely* from its analysis without even examining the data showing where consumers shop for groceries. But in the real world—as under antitrust law—the Attorney General does not determine the scope of a relevant product market; consumers do. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962) (emphasizing market definition must reflect “commercial realities of the industry”); *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1063 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (“[T]he FTC’s case is weak and seems a relic of a bygone era when antitrust law was divorced from basic economic principles.”). And in the real world, concrete data on consumer behavior fundamentally undermines the State’s proposed product market.

The State’s case ignores the robust competition that Kroger and Albertsons face from all angles: It barely acknowledges the competitive pressure of large retailers like Walmart and Target, *see, e.g.*, Mot. 39; it asks this Court to disregard “[c]lub [s]tores like Costco and Sam’s Club,” Mot. 5; and it fails to even *mention* Amazon. Yet these modern retailers recognize that groceries draw shoppers into their stores and onto their websites, and they have made every effort to expand their food offerings. Other competitors are following the same playbook: value stores like Dollar General challenge Kroger’s market position, regularly opening new locations and expanding their food offerings; retailers like Whole Foods and Sprouts apply strong competitive pressure for premium, natural, and organic products, proliferating in urban centers like Denver and Boulder; meanwhile, Colorado-based Natural Grocers and stores like Clark’s provide important regional competition. The State ignores all of those competitors, refusing to even mention them by name.

But by failing to consider the world of grocery retail as it exists today, the State tethers itself to a deeply misinformed and short-sighted theory of competition that is not supported by data, evidence, or logic.

The State's proposed geographic markets—consisting of entire “city areas”—lack a logical foundation as well. The State's geographic markets fail to account for consumers' willingness to travel farther to certain stores (like Costco and Walmart), or their ability to order groceries delivered to their doorstep through e-commerce services like Instacart, DoorDash, Amazon, and Uber. Not even the State's expert, Dr. Nitin Dua (whose report was served just last week) agrees with the State's version of Colorado's geographic markets: The State's Motion counts 39 separate “city areas” within the State, while Dr. Dua [REDACTED]. Expert Rep. of Nitin Dua at 4 (June 17, 2024) (“Dua Rep.”) (Ex. 2). The State and its expert fail to explain the disparity.

The State and its expert also pretend the Amended Divestiture Agreement does not exist, notwithstanding this Court's holding that “it is appropriate for the Court to consider that evidence at the preliminary injunction hearing.” MIL Hr'g Tr. at 82 (May 31, 2024). Thus, despite the State's concession that “some of [its] concerns … were addressed, in part, by the new [divestiture] plan,” MIL Hr'g Tr. at 19 (May 31, 2024) (R. Alexander), the State has not supplemented or amended its Motion to account for the expansive new package of assets that C&S is now purchasing. The effects of the State's tactics are tangible and prejudicial: While the Motion asserts that Kroger will acquire 52 Albertsons stores in Colorado, Mot. 14, the reality is that Kroger will acquire just 14. Accordingly, Defendants largely are forced to speculate in this Opposition about the State's concerns over C&S and the Amended Divestiture Agreement. Yet this Court cannot grant a Motion that demonstrably fails to take into account the facts of the *actual* merger.

Even beyond the merits of the State’s antitrust claim, the State fails to meaningfully confront the criteria required to receive the “extraordinary relief” of a preliminary injunction. *Rathke*, 648 P.2d at 651. For example, the State cites no evidence whatsoever in support of the “public interest” element. Nor can it. Where, as here, a merger is nationwide, the “public” includes the citizens of all 50 states. Yet the State has not even *attempted* to prove that enjoining the merger is in the interest of the entire nation; nor is it empowered to act as a nationwide antitrust enforcer. And while this Court held today that the scope and constitutionality of the State’s requested relief could not be decided “as a matter of law” on a motion to dismiss, *see Order Denying Defs.’ Mot. to Dismiss* at 13, 21 (June 26, 2024), the procedural posture of the State’s Motion is fundamentally different. On this Motion, *the State* is the movant, and it now has the burden of satisfying the “public interest” element with *evidence*. Its perfunctory two-paragraph argument, Mot. 65, does not meaningfully attempt to meet that burden.

Finally, the State filed this Motion at the same time as its Complaint, with remarkably little evidentiary support, and before any discovery took place. As a result, it has forced Defendants into an unorthodox two-phased procedural posture that is both inequitable and prejudicial. Kroger and Albertsons have already stipulated that they will not close the merger until after a ruling on the motion for a preliminary injunction in the parallel FTC Action: *FTC v. Kroger Co.*, No. 3:24-CV-347 (D. Or.). If this Court denies the State’s request for a preliminary injunction, therefore, the status quo remains. In that scenario, the State will seek to supplement its evidence and expert reports and take a second bite at the apple. June 10, 2024 Hr’g Tr. at 40-41 (A. Biller) (claiming it is “undoable” for the State’s experts to prepare for the preliminary injunction hearing with the discovery gathered by the discovery deadline). If the State wins its Motion, however, it can claim victory and score the publicity points that it seeks. Meanwhile, Defendants bear all the risk. Were

this Court to enjoin the merger, even “preliminarily,” it could threaten the entire transaction by delaying the closing beyond the contractual “outside date” of October 9, 2024. *See Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) (“Experience seems to demonstrate that … the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.”). Particularly with stakes this high, this Court should not be the first court in history to grant a preliminary injunction against a merger nationwide under state law.

## **BACKGROUND**

### **A. Competition in the Modern Grocery Industry**

Colorado’s theory of the case rests on the premise that the American grocery industry caters to an antiquated suburban prototype: a single-family home with one working adult and another stay-at-home spouse who handles all the family’s weekly grocery shopping at a single store. But the State’s vision of grocery consumers is unsupported by any data, and it is divorced from today’s reality. The State disregards entirely the competitive pressure from high-volume grocery sellers like Costco, which is steadily gaining share. It relegates to the fringes grocers like Whole Foods and Sprouts. And it ignores the emergence of same-day deliveries through Amazon Prime and other e-commerce platforms. In short, the State refuses to acknowledge that so-called “traditional” grocery stores no longer hold an unchallenged grip on consumers’ weekly grocery purchasing.

#### **1. Key Competitors in the Grocery Industry**

Times have changed, and the State’s outdated view of competition in the grocery industry no longer reflects reality. Most prominently, powerful companies in the grocery retail space have overhauled how consumers buy their groceries. Walmart—a store that rose to prominence selling household goods ranging from kids’ bikes to lawn chairs—is now by far the biggest grocery

retailer in the United States.<sup>2</sup> Stores like Target are trying to catch up. Target’s “PFresh” line, for example, offers fresh produce along with its other full-scale grocery services.<sup>3</sup> Target’s Chief Food and Beverage Officer observed that its grocery sections are “actually a gateway to the rest of the store,” and Target “wants more customers to think of it when checking off the[ir] grocery list.”<sup>4</sup>

Meanwhile, club stores like Costco and Sam’s Club have expanded their grocery footprints. Sarah George, Costco’s Senior Vice President of Merchandising for Corporate Food and Sundries, testified that Costco’s grocery business [REDACTED]<sup>5</sup> Costco’s business model has allowed the company to [REDACTED]  
[REDACTED].<sup>6</sup>

For its part, Sam’s Club has explained that, [REDACTED]  
[REDACTED]  
[REDACTED]<sup>7</sup>

The data shows that a high percentage of Kroger and Albertsons customers are also club-store members, placing retailers like Costco and Sam’s Club at the forefront of competition in the grocery industry.<sup>8</sup> Moreover, “club” stores do not require a membership for customers to shop at their stores through services like Instacart, which further expands their reach.<sup>9</sup>

<sup>2</sup> See Nassauer, *Walmart’s Reign as America’s Biggest Retailer Is Under Threat* (Ex. 1).

<sup>3</sup> Tanzina Vega, *Shopping at Target? Now You Can Pick Up a Dozen Eggs*, New York Times (Dec. 16, 2010) <https://nyti.ms/4eGhrva> (“Target, the store that sells things like diapers and electronics, has been aggressively marketing its fresh food offerings this year in a major nationwide campaign.”).

<sup>4</sup> Melissa Repko, *Target Wants Shoppers to Think of it for Groceries as Retailer Braces for Leaner Spending*, CNBC (May 16, 2023), <https://cnb.cx/3xiO9XK..>

<sup>5</sup> Deposition of Sarah George at 67:10-20 (June 10, 2024) (“George Dep.”) (Ex. 3).

<sup>6</sup> George Dep. at 71:4-11, 85:3-7 (Ex. 3)

<sup>7</sup> Deposition of Evan Grisham at 27:6-13, 39:14-21 (June 18, 2024) (“Grisham Dep.”) (Ex. 4).

<sup>8</sup> See, e.g., KRPOROD-CO-LIT-000218285 ([REDACTED]) (Ex. 5).

<sup>9</sup> George Dep. at 42:4-13 (Ex. 3).

Trader Joe's has also strengthened its market reach, with its grocery performance hailed as one of the "breakthrough stories in retail."<sup>10</sup> Its success has fueled nationwide growth, with dozens of recent and planned store openings as the company expands into new markets.<sup>11</sup>

Other grocery retailers have gained footholds, too. This month, the *New York Times* heralded a new era of so-called "ethnic" grocery stores: "As Asian groceries like H Mart, Patel Brothers and 99 Ranch expand, they are reshaping American eating habits, and the American grocery market."<sup>12</sup> Colorado-based Natural Grocers likewise illustrates the growth of regional chains, tailoring offerings to urban centers across the Front Range and coupling its all-natural 100% organic and non-GMO products with in-store nutrition classes, a one-on-one nutrition coaching service, and the largest selection of vitamins and supplements of any grocery chain.<sup>13</sup>

And then there's Amazon. In 2017, the e-commerce giant announced its entry into the brick-and-mortar grocery industry with a bang, purchasing Whole Foods and increasing competition overnight.<sup>14</sup> Today, Whole Foods has an extensive Colorado footprint, with 24 stores across Colorado (~5% of Whole Foods stores nationwide).<sup>15</sup>

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<sup>10</sup> R.J. Hottovy, *The Secret to Trader Joe's Success in 2023*, Placer.ai (Sept. 15, 2023), <https://bit.ly/4blbPZc>.

<sup>11</sup> Linda Moss, *Trader Joe's Scouts Out Two Dozen New Stores Across US as Competition Picks Up*, CoStar News (June 3, 2024), <https://bit.ly/4civOsT>; Deposition of Kathryn Cahan at 63:18-25 (June 6, 2024) ("Cahan Dep.") (Ex. 6).

<sup>12</sup> Priya Krishna, *Don't Call It an 'Ethnic' Grocery Store*, New York Times (June 11, 2024), <https://nyti.ms/3z9ZGZC>.

<sup>13</sup> *Our Standards*, Natural Grocers, <https://bit.ly/45ARIKI> (last visited June 25, 2024); *Event-Finder*, Natural Grocers, <https://bit.ly/3zgNyq5> (last visited June 25, 2024); *Nutritional Health Coaches*, Natural Grocers, <https://bit.ly/3KV1W9R> (last visited June 25, 2024); NG-Kroger\_0000118 (Ex. 7).

<sup>14</sup> Seth Stevenson, *It's Finally Clear Why Amazon Bought Whole Foods*, Slate.com (June 28, 2021), <https://bit.ly/3VXIVtD>.

<sup>15</sup> WholeFoods, <https://bit.ly/3VWuR3E> (last visited June 25, 2024).

Both Amazon's brick-and-mortar grocery stores and its online grocery business [REDACTED]

[REDACTED].<sup>16</sup> To ensure its pricing is competitive, [REDACTED]

[REDACTED].<sup>17</sup> Amazon's grocery sales [REDACTED]

[REDACTED]<sup>19</sup> Amazon's same-day fulfillment centers, [REDACTED]

<sup>20</sup>

Amazon is expanding these same-day fulfillment centers, [REDACTED]

[REDACTED].<sup>21</sup> Amazon also has partnerships with third-party stores, [REDACTED]

<sup>22</sup>

## 2. *The Modern Grocery Consumer*

The proliferation of grocery retail competitors reflects changes in consumers' grocery-purchasing behavior. While consumers might once have relied on a single store to provide "substantially all of their food and grocery shopping requirements," as the State claims, Mot. 27, such a world no longer exists. The data shows that less than 7% of U.S. customers shop exclusively at one food store in a month,<sup>23</sup> indicating that they seek value across different stores and channels

<sup>16</sup> Deposition of Sam Heyworth at 48:18-49:8 (June 7, 2024) ("Heyworth Dep.") (Ex. 8) ([REDACTED]).

<sup>17</sup> *Id.* at 32:16-33:5.

<sup>18</sup> *Id.* at 28:8-13, 30:3-8.

<sup>19</sup> *Id.* at 24:12-25:19, 67:22-68:2.

<sup>20</sup> *Id.* at 39:11-24.

<sup>21</sup> *Id.* at 40:18-22.

<sup>22</sup> *Id.* at 77:6-78:22.

<sup>23</sup> Food Marketing Institute, 2023 US Grocery Shopper Trends at 17 (Ex. 9).

rather than gravitating to the alleged “ease of one-stop shopping.” *Contra Mot.* 4.<sup>24</sup> Indeed, in 2023, the average household made 2.6 trips to purchase groceries each week.<sup>25</sup> The modern grocery consumer shops in multiple trips, at multiple stores, and across multiple channels.<sup>26</sup>

The data shows that Americans’ shopping trips—and consumers’ grocery dollars more broadly—are no longer concentrated at so-called “traditional” grocery stores. Industry reports show that consumers shopped at an average of 3.6 channels and 5.2 banners per month, with millennials shopping at considerably more channels (with particularly high Internet shopping usage).<sup>27</sup> Supporting that data, the Department of Agriculture found that, in 1997, “grocery stores” accounted for 72% of food for home consumption.<sup>28</sup> By 2022, however, that figure had dropped to approximately 54%.<sup>29</sup> In contrast, “warehouse clubs and supercenters” like Costco and Walmart increased their share of food spending almost threefold over the same period, from 8% to about 22%.<sup>30</sup> Meanwhile, by around 2010, consumers’ overall spending on “food away from home” had surpassed the amount they spend on food at home; the data shows that Americans are dining out more and shopping for groceries less.<sup>31</sup>

Reinforcing these trends, Kroger’s customers spend just a small fraction of their total “grocery dollars” each week at Kroger and Albertsons stores. In 2023, [REDACTED]  
[REDACTED]

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 16.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.* at 17.

<sup>28</sup> U.S.D.A. ERS, *Interactive Charts: Food Expenditures*, last updated Sept. 27, 2023, <https://bit.ly/3XAGRJh>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

[REDACTED]

[REDACTED] <sup>33</sup>

The same is true for Albertsons: From early 2023 to early 2024, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] <sup>36</sup> Indeed, the typical Albertsons' customer [REDACTED]  
[REDACTED] <sup>37</sup>

The expansion of e-commerce grocery retailers has also changed how people shop for food and groceries, with online grocery shopping now accounting for approximately 18% of consumers' weekly grocery spending.<sup>38</sup> Unsurprisingly, Amazon dominates online grocery shopping, [REDACTED]

[REDACTED].<sup>39</sup> As of Q4 2022, [REDACTED]  
[REDACTED]  
[REDACTED].<sup>40</sup>

The COVID-19 pandemic in March 2020 accelerated the ongoing competitive changes to the grocery ecosystem.<sup>41</sup> In a matter of days, consumers were forced to overhaul their shopping

<sup>32</sup> KRPROM-WA-LIT-000168076 at -8092 (Ex. 10).

<sup>33</sup> *Id.*

<sup>34</sup> ACI\_LIT\_0003144423 at -4457 (Ex. 11).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at -4424.

<sup>37</sup> ACI\_LIT\_0004380550 at -0550, -0555, -0557(Ex. 12).

<sup>38</sup> Food Marketing Institute, 2023 US Grocery Shopper Trends at 24 (Ex. 9).

<sup>39</sup> ACI2R-0018145814 at 3 (Ex. 13).

<sup>40</sup> ACI2R-0015502256 (Ex. 14)

<sup>41</sup> U.S.D.A. ERS, *Interactive Charts: Food Expenditures*, last updated Sept. 27, 2023, <https://bit.ly/3XAGRJh>.

habits, and competitors recognized the transformation as an opportunity. E-commerce companies like UberEats, DoorDash, Amazon, and Instacart expanded consumers' geographic grocery delivery options. Other delivery competitors have emerged, too. And there will be more. Simply put, consumers do not need to push a cart down an aisle to buy their groceries. Kroger must compete vigorously to ensure that many still choose to do so.

### ***3. Kroger's and Albertsons' Businesses***

In Colorado, Kroger competes under the City Market and King Soopers banners, while Albertsons operates the Safeway and Albertsons banners. Mot. 1-2. Those banners face competition from multiple angles within Colorado.

Joe Kelley, the president of King Soopers, testified that Walmart [REDACTED]

[REDACTED] <sup>42</sup> Across all levels of the company, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] <sup>45</sup> Apart from Walmart, Kroger also faces a broad swath of competitors in Colorado, including Costco, Natural Grocers, Whole Foods, Amazon, Sprouts, Clark's, drug stores, and convenience stores.<sup>46</sup>

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<sup>42</sup> Deposition of Joseph Kelley at 76:13-15, 99:20-23 (May 29, 2024) ("Kelley Dep. Day 1") (Ex. 15).

<sup>43</sup> See, e.g., Deposition of Andy Groff at 329:20-330:16 (May 29, 2024) ("Groff Dep.") (Ex. 16); see also id. at 92:17-93:18 [REDACTED].

<sup>44</sup> See, e.g., Kelley Dep. Day 1 at 119:13-15 (Ex. 15).

<sup>45</sup> Deposition of Rodney McMullen at 170:22-171:1 (June 6, 2024) ("McMullen Dep.") (Ex. 17); see Deposition of Stuart Aitken at 210:9-211:8 (June 5, 2024) ("Aitken Dep.") (Ex. 18).

<sup>46</sup> Deposition of Joseph Kelley (Day 2) at 27:17-28:11 (May 30, 2024) ("Kelley Dep. Day 2") (Ex. 19).

Albertsons' witnesses and ordinary-course documents confirm that it too faces intense competition in Colorado from many retailers.<sup>47</sup> Todd Broderick, the President of the Denver Division (which includes the vast majority of Albertsons' stores in Colorado), [REDACTED]

[REDACTED]

[REDACTED]<sup>48</sup> Tina Lucero, former Vice President of Marketing & Merchandising for the Denver Division, observed that [REDACTED]

[REDACTED]<sup>49</sup> Lucero [REDACTED]

[REDACTED]

[REDACTED]<sup>50</sup> And John Colgrove, President of the Intermountain Division at Albertsons (which covers five stores in Colorado), testified that [REDACTED]

[REDACTED]

[REDACTED]<sup>51</sup> Others at Albertsons have described the same evolving competitive threats—both [REDACTED]

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<sup>47</sup> ACI\_LIT\_0003144423 at -4431, -4437 (national competition) (Ex. 11); ACI2R-0007338568 at -8579 to -8582, -8586, -8604 to -8605 (Colorado competition) (Ex. 20); *see also* ACI2R-0003307404 at 2 (further detail on Colorado competition) (Ex. 21); ACI2R-0000069406 (email discussing Colorado competition) (Ex. 22); ACI2R-0000902619 (email discussing national competition) (Ex. 23).

<sup>48</sup> Deposition of Todd Broderick at 156:3-11 (June 11, 2024) (“Broderick Dep.”) (Ex. 24); *see also* Deposition of Dennis Schwarz at 107:6-9, 115:14-12 (June 5, 2024) (“Schwarz Dep.”) (Ex. 25).

<sup>49</sup> Deposition of Bettina Lucero at 25:16-23 (June 19, 2024) (“Lucero Dep.”) (Ex. 26); ACI2R-0006625206 ([REDACTED] (Ex. 27); ACI2R-0003307404 [REDACTED]

(Ex. 21); ACI2R-0023362735 [REDACTED]

(Ex. 28).

<sup>50</sup> See, e.g., ACI2R-0015165210 (Ex. 29); ACI2R-0015207363 (Ex. 30).

<sup>51</sup> Deposition of John Colgrove at 23:3-25:21 (May 22, 2024) (“Colgrove Dep.”) (Ex. 31); *see also* Deposition of Teresa Whitney at 57:20-62:15 (May 16, 2024) (“Whitney Dep.”) (Ex. 32)

[REDACTED]

nationwide and in the Denver Division.<sup>52</sup> Indeed, as of March 2023, [REDACTED]

[REDACTED]<sup>53</sup>

#### **4. The Businesses of Other Grocery Retailers**

Third-party retailers in Colorado recognize the same competitive dynamics that Kroger and Albertsons are confronting. Costco, which has sixteen locations in Colorado, [REDACTED]

[REDACTED]<sup>54</sup> Costco's

perspective is [REDACTED]<sup>55</sup> Costco competes with its grocery competitors on multiple dimensions, [REDACTED]

[REDACTED]<sup>56</sup>

Sprouts, a national grocery retailer with 33 stores in Colorado,<sup>57</sup> similarly competes [REDACTED]

[REDACTED]<sup>58</sup> Sprouts regularly [REDACTED]

[REDACTED]<sup>59</sup> Trader Joe's, with ten Colorado stores, likewise [REDACTED]

[REDACTED]<sup>60</sup>

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<sup>52</sup>ACI2R-0000069406 [REDACTED]

) (Ex. 22); *see also* ACI2R-0009845992 [REDACTED]

) (Ex. 33).

<sup>53</sup> ACI2R-0015502134 at -2167 (Ex. 34).

<sup>54</sup> George Dep. at 26:7-27:3 (Ex. 3).

<sup>55</sup> *Id.* at 27:16-24.

<sup>56</sup> *Id.* at 22:22-23:10.

<sup>57</sup> See Sprouts Farmers Market, <https://bit.ly/3zjlPfA> (last visited June 25, 2024).

<sup>58</sup> Deposition of John Neal at 43:19-44:15 (June 4, 2024) ("Neal Dep.") (Ex. 35).

<sup>59</sup> *Id.* at 58:3-64:4.

<sup>60</sup> Cahan Dep. at 39:15-21, 151:5-9 (Ex. 6).

Whole Foods—another major retailer—views the grocery market as [REDACTED]

[REDACTED]<sup>61</sup> Whole Foods, which has more than twenty locations across Colorado, views [REDACTED]

[REDACTED]<sup>62</sup> Amazon Fresh shares Whole Foods' view of the competitive landscape.<sup>63</sup> And an Amazon.com representative testified [REDACTED]

[REDACTED]

[REDACTED]<sup>64</sup>

For its part, Walmart, the nation's largest grocer, [REDACTED]

[REDACTED]

[REDACTED]<sup>66</sup>

Walmart also [REDACTED]

[REDACTED]<sup>67</sup> Walmart sees [REDACTED]

[REDACTED] Sam's Club,  
which is owned by Walmart, [REDACTED]

[REDACTED]

[REDACTED]<sup>69</sup> Together, Walmart and Sam's Club have more than 100 locations across Colorado.

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<sup>61</sup> Deposition of Sonya Oblisk at 132:3-18 (June 11, 2024) (“Oblisk Dep.”) (Ex. 36).

<sup>62</sup> *Id.* at 13:15-16:13.

<sup>63</sup> *Id.* at 21:13-25:8.

<sup>64</sup> Heyworth Dep. at 48:18-49:8 (Ex. 8); *see id.* at 24:8-25:19; 26:4-24.

<sup>65</sup> Deposition of Marc Lieberman at 23:18-27:15 (June 20, 2024) (“Lieberman Dep.”) (Ex. 37).

<sup>66</sup> *Id.* at 43:15-24.

<sup>67</sup> *Id.* at 40:13-41:20.

<sup>68</sup> *Id.* at 105:9-18.

<sup>69</sup> Grisham Dep. at 23:1-33:4 (Ex. 4).

Dollar stores likewise compete with various retailers for share of shoppers' grocery wallet.

Dollar General testified [REDACTED]

[REDACTED]<sup>70</sup> Family Dollar recognizes [REDACTED]

[REDACTED]<sup>71</sup> In addition, [REDACTED] Family Dollar stores offer delivery of consumables through Instacart.<sup>72</sup>

#### **B. The Merger Transaction**

The merger at issue in this case consists of two components: (1) Kroger's acquisition of Albertsons' stores and assets in the Merger Agreement; and (2) Kroger's divestiture of 579 stores and substantial supporting assets to C&S (the "Amended Divestiture Agreement").

##### *1. The Structure of the Merger*

In early 2022, Albertsons issued a press release and SEC filings announcing that it was considering various strategic alternatives, including the potential sale of assets.<sup>73</sup> After that announcement, Kroger pursued the acquisition of Albertsons, seeking to combine the companies' complementary assets and expand Kroger's lower-priced business model to Albertsons' existing operations. After months of negotiations, on October 13, 2022, Kroger and Albertsons announced the Merger Agreement, under which Kroger will acquire Albertsons for \$24.6 billion, subject to certain adjustments.<sup>74</sup>

Kroger and Albertsons operate nationwide, with Kroger stores in 35 states and Albertsons stores in a different set of 34 states.<sup>75</sup> In the vast majority of states, Kroger and Albertsons do not overlap. In the following 29 states, either Kroger or Albertsons (or both) own no stores at all, such

<sup>70</sup> Deposition of Nicholas Snow at 37:12-38:14 (June 6, 2024) ("Snow Dep.") (Ex. 38).

<sup>71</sup> Deposition of Kurt Unkelbach at 72:8-73:3 (May 30, 2024) ("Unkelbach Dep.") (Ex. 39).

<sup>72</sup> *Id.* at 74:16-22.

<sup>73</sup> Albertsons' 8-K SEC Filing (Apr. 12, 2022), <https://bit.ly/4cklr7W>.

<sup>74</sup> Compl. ¶ 53.

<sup>75</sup> Compl. ¶ 19 & n.7; *id.* ¶ 22 n.8.

that they do not even arguably compete for the same consumers: OK, MN, PA, NJ, NY, CT, RI, MA, VT, NH, ME, WV, KY, TN, NC, SC, GA, FL, AL, MS, OH, MI, WI, IA, MO, KS, ND SD, and HI.<sup>76</sup> And in another three states, Kroger and Albertsons' stores are nowhere near each other: in Arkansas, Albertsons has only one store in the southwest, where Kroger is not present; in Nebraska, Kroger operates in Omaha, while Albertsons operates only in the western part of the state; and in Delaware, there is no Albertsons store within five miles of a Kroger store.<sup>77</sup>

In the states without overlap, the merger undisputedly will be a story of expansion and efficiencies that will allow Kroger to strengthen Albertsons' presence, improve the consumer shopping experience, and better compete against powerful retailers. None of those states have challenged the merger, and the State of Colorado has not alleged any harm in those states.

Anticipating regulators' concerns in specific geographic markets where Kroger and Albertsons do overlap, however, the Merger Agreement employs the common antitrust solution of a divestiture, providing for the potential divestiture of up to 650 stores.<sup>78</sup> A significant divestiture of assets was accordingly built into the Merger Agreement from the beginning.

## **2.     *The Divestiture Agreements***

On September 8, 2023, Kroger and Albertsons announced that it had entered into a binding divestiture agreement with C&S.<sup>79</sup> That agreement permitted Kroger to add up to 237 additional stores to the original 413-store divestiture package to address any concerns from regulators. Thus, for nine months, the State has known that C&S will be the divestiture buyer.

<sup>76</sup> *Investor Presentation*, KrogerAlbertsons.com (Oct. 14, 2022), <https://bit.ly/4eGd7ki>.

<sup>77</sup> *Id.*

<sup>78</sup> Agreement and Plan of Merger By and Among Albertsons Companies, Inc. The Kroger Co. and Kettle Merger Sub, Inc. ("Merger Agreement") (Oct. 13, 2022) at 65 (Ex. 40).

<sup>79</sup> See Compl. ¶ 173-185; Kroger Press Release, *Kroger and Albertsons Companies Announce Comprehensive Divestiture Plan with C&S Wholesale Grocers, LLC in Connection with Proposed Merger*, Kroger.com (Sept. 8, 2023), <https://bit.ly/4bgcUBx>.

As discovery has shown, C&S is a well-capitalized and established grocery operator, with more than 100 years of successful grocery industry experience. Indeed, C&S is the eighth-largest privately owned company in the United States, with annual revenues exceeding [REDACTED]

[REDACTED] .<sup>80</sup>

C&S is an ideal divestiture candidate. C&S's primary business is grocery wholesale, meaning it has expertise in the core logistics of the grocery business: shipping food and household goods across the country. As part of that business, C&S delivers groceries and other household goods to an extensive network of retail customers, supplying more than 7,500 stores with nearly 137,000 different products.<sup>81</sup> C&S also boasts a comprehensive suite of services to its retail customers, including retail development such as store design and layout, equipment supply, merchandising support, and business planning solutions; pharmacy network support; retail marketing and advertising; digital marketing such as social media management and loyalty and personalized marketing; retail technology including mobile order entry, point-of-sale support, and accounting/payroll services; and private brand support.<sup>82</sup>

Despite C&S's extensive experience in the grocery industry as a wholesaler and service provider, it has in the past suggested that it did not have plans to expand into the retail space. *See* Mot. 3. But C&S has changed its long-term business plan.<sup>83</sup> Just as companies like Walmart and

<sup>80</sup> Deposition of Eric Winn at 148:23-149:3 (June 4, 2024) ("Winn Dep. Day 1") (Ex. 41); *id.* at 154:23-155:3.

<sup>81</sup> *See* Forbes, *America's Largest Private Companies: C&S Wholesale Grocers* (Nov. 14, 2023) <https://bit.ly/4eukueR>.

<sup>82</sup> Our Stores and Services, C&S Wholesale Grocers, <https://www.csbg.com/services/>.

<sup>83</sup> Deposition of Eric Winn at 378:2-10 (June 5, 2024) ("Winn Dep. Day 2") (Ex. 42) [REDACTED]

[REDACTED] *see* Project 2025 Update deck (FTC-CS-00001695) (Ex. 43).

Amazon have sought to grow their grocery business, C&S started searching for new opportunities in the grocery retail industry.

As part of that expansion plan, C&S has acquired multiple retail grocery outlets. Today, C&S operates retail banners in various states, including stores in Wisconsin under the banner “Piggly Wiggly Midwest” and in New York and Vermont under the banner “Grand Union.”<sup>84</sup> C&S increased these retail operations in the Northeast as part of a divestiture that the FTC blessed in a prior grocery merger. *See In re Price Chopper/Tops Markets*, FTC Dkt. No. C-4753, <https://bit.ly/45wUxXW>. As part of that divestiture process, in 2021, the FTC reviewed C&S’s business and found C&S to be “a suitable purchaser that is well-positioned to enter the relevant markets through the divested stores and prevent the increase in market concentration and likely competitive harm that otherwise would have resulted from the Merger.” *Id.* at 3. C&S has continued to run and maintain the competitiveness of each of those divested stores.<sup>85</sup>

When Kroger approached C&S with the opportunity to purchase up to 650 divested stores as part of this merger, C&S jumped at the opportunity.<sup>86</sup> After announcing the Original Divestiture Agreement with C&S on September 8, 2023, Kroger and Albertsons continued discussions with the FTC and state attorneys general (including Colorado’s) about the scope of the divestiture. On January 18, 2024, Defendants presented the State with a proposed divestiture package that included nearly all the stores in Colorado covered by the now-binding Amended Divestiture Agreement.

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<sup>84</sup> *Grand Union Supermarkets*, C&S Wholesale Grocers, <https://bit.ly/4cA3mSW> (last visited June 25, 2024); *Piggly Wiggly Supermarkets*, C&S Wholesale Grocers, <https://bit.ly/4eDH6JG> (last visited June 25, 2024).

<sup>85</sup> Winn Dep. Day 2 at 490:10-492:20 (██████████); Deposition of Mark McGowan at 69:11-19 (May 31, 2024) (“McGowan Dep.”) (Ex. 44) (██████████; *id.* at 77:8-15 ██████████).

<sup>86</sup> *See, e.g.*, Winn Dep. Day 1 at 210:14-211:13, 239:12-240:10 (Ex. 41).

Discussions concerning the divestiture were ongoing when the State brought this suit, while Defendants continued working on a divestiture package that addressed the regulators' concerns.

On April 22, 2024, Kroger announced an updated, binding divestiture agreement with C&S, which it promptly disclosed to the State.<sup>87</sup> The Amended Divestiture Agreement was calibrated to resolve competitive concerns that the FTC and other regulators had raised, and it specifically addresses the competitive concerns the State raised in its Motion:

- **Number of Stores.** In response to the State's concerns that the initial divestiture of 52 stores in Colorado was insufficient, Mot. 14, the Amended Divestiture Agreement provides C&S with 91 Albertsons stores in Colorado, leaving Kroger with only 14 new stores across the state.<sup>88</sup>
- **Safeway Banner.** In response to the State's concerns about the expense, risk, and burden of re-banning Safeway stores in Colorado, Mot. 54, the Amended Divestiture Agreement provides C&S with a full exclusive license to the Safeway banner in Colorado.<sup>89</sup>
- **Dairy Facilities.** In response to the State's concerns about inadequate dairy facilities, Mot. 14, [REDACTED]
- **Private Labels.** In response to the State's concerns about C&S's access to private label products, Mot. 15, the Amended Divestiture Agreement provides C&S with five of Albertsons' private label brands, in addition to [REDACTED] licensed access to another two Albertsons private label brands, Signature and O Organics.<sup>90</sup>
- **Employees and Staffing.** In response to concerns about C&S's ability to staff its new operations, Mot. 57, the Amended Divestiture Agreement provides that all store and distribution center-level employees will transfer to C&S with the divested stores and distribution centers. [REDACTED]

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<sup>87</sup> See Am. C&S Agreement at 1.

<sup>88</sup> *Id.* Schedule 2.1(a)-A, Schedule 2.1(c)-A.

<sup>89</sup> *Id.* Ex. J at 1, 4.

<sup>90</sup> *Id.* at 32.

<sup>91</sup> Winn Dep. Day 1 at 243:5-13 (Ex. 41); McGowan Dep. at 235:11-23 (Ex. 44).

<sup>92</sup> *Id.* Ex. B at 10-11.

93

- **Technology Services.** In response to concerns about the transition of technology services, the Amended Divestiture Agreement provides for C&S to receive a clone of Albertsons' "tech stack," along with a license to the "tech stack" for five years.<sup>94</sup>

Despite these changes, the State has neither amended nor supplemented its Motion to account for the Amended Divestiture Agreement.

### **3.      *The Overwhelming Benefits of the Merger***

Since its founding in 1883, Kroger has developed and adapted its business model to account for changing competitive dynamics. Kroger's current business model focuses on revenue growth and cost savings to enable price investments that help Kroger compete with Walmart, the country's number one grocery retailer, along with myriad other retail grocery competitors. *Supra* at 10-15.

As one Kroger executive testified:

95 Kroger

has proven its commitment to that strategy in prior acquisitions, investing more than \$100 million to lower prices at each of Harris Teeter and Roundy's after acquiring those chains.<sup>96</sup>

Kroger now seeks to bring its business model to Albertsons stores, and it expects to achieve significant efficiencies by doing so. Since the deal was announced in 2022, Kroger has retained multiple consultants and conducted extensive analyses to identify opportunities to lower costs and unlock additional revenue after the merger closes.<sup>97</sup> Kroger's internal target is

██████████ in annual run-rate efficiencies from the transaction—from cost savings in sourcing, supply

<sup>93</sup> *Id.* at Schedule 4.15(a), Schedule 9.1.

<sup>94</sup> *Id.* at 102-104, Ex. B at 16-21.

<sup>95</sup> Aitken Dep. at 210:9-211:8 (Ex. 18).

<sup>96</sup> Deposition of Tim Springer at 20:4-20, 22:17-23:1 (June 11, 2024) ("Springer Dep.") (Ex. 45).

<sup>97</sup> See KRPROM-FTC-2R-027400159 at -0169, -0171 (Ex. 46).

chain, and manufacturing, among other areas, along with revenue growth.<sup>98</sup> Kroger will start lowering prices at Albertsons stores on day one: It has publicly announced that, during the first four years, Kroger will invest at least \$500 million to lower prices at Albertsons stores,<sup>99</sup> even before any efficiencies are realized.<sup>100</sup> Kroger also will add another \$1.3 billion to improve Albertsons' stores.<sup>101</sup>

Through the merger, Kroger will improve Albertsons' operations, private label offerings,<sup>102</sup> product selection,<sup>103</sup> and data analytics,<sup>104</sup> providing both cost savings and a better experience for consumers at existing Albertsons stores.

### C. Procedural History

#### 1. *Pre-Litigation Discussions*

After the merger was announced, Kroger and Albertsons initiated discussions with the State, the FTC, and numerous other stakeholders in an effort to address any concerns about the merger.<sup>105</sup> The FTC then issued a Request for Additional Information and Documentary Materials (“Second Request”) to the merging parties, pursuant to which the parties produced nearly 20 million documents, terabytes of data, and written responses to regulators, including the State. The FTC also took testimony during investigational hearings from 15 individuals at Kroger and

<sup>98</sup> Deposition of Mafaz Maharoof at 133:24-135:1 (June 4, 2024) (“Maharoof Dep. Day 1”) (Ex. 47).

<sup>99</sup> Maharoof Dep. Day 1 at 111:23-112:9 (Ex. 47).

<sup>100</sup> Aitken Dep. at 170:11-171:14, 209:7-210:7 (Ex. 18).

<sup>101</sup> See Kroger Press Release, *Kroger, Albertsons Companies and C&S Wholesale Grocers, LLC Announce an Updated and Expanded Divestiture Plan* (Apr. 22, 2024) <https://bit.ly/3xyEjB1>.

<sup>102</sup> McMullen Dep. at 30:16-23 (Ex. 17).

<sup>103</sup> *Id.* at 32:25-33:10.

<sup>104</sup> *Id.* at 180:14-22.

<sup>105</sup> See generally *Protocol for Coordination in Merger Investigations*, FTC, <https://bit.ly/42Atf1d> (last visited June 25, 2024) (“To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger”)

Albertsons, as well as from 13 third-party individuals (including C&S's CEO), to which the State also had access. Separately, the State issued its own Civil Investigative Demand on June 23, 2023 seeking much of the same information as the Second Request and further document productions.

Thus, by the time the State filed its Complaint, it already had collected extensive discovery from Defendants, including a "stack of hard drives in [counsel's] office with terabytes of data that were produced." Hr'g Tr. at 34 (Mar. 25, 2024) (A. Biller). Defendants, meanwhile, had no opportunity to serve discovery on either the State or critical third parties until after litigation began.

## ***2. The State's Complaint and Motion for a Preliminary Injunction***

On February 14, 2024, the State filed its Complaint, asserting two counts under the Colorado Antitrust Act. Count I alleges that the merger would substantially lessen competition in Colorado, yet it seeks an injunction against the merger from proceeding in any state. Compl. ¶¶ 247-49, Prayer. Unlike every other plaintiff to challenge the merger, the State filed its Motion on the same day as its Complaint, before any formal discovery had begun.

Also unlike any of the other plaintiffs, the State's Complaint named C&S as a defendant, making the divestiture a centerpiece of its case. The Complaint spends more than 75 paragraphs arguing that the September 8, 2023 divestiture to C&S fails to address the State's competitive concerns. *See, e.g.*, Compl. ¶¶ 172-246. The State similarly focuses its Motion on the September 8, 2023 divestiture, spending 15 of its 66 pages discussing that now-superseded agreement, asserting that it was inadequate. Mot. 49-64. The State has not attempted to supplement its Complaint or Motion to account for the April 22, 2024 Amended Divestiture Agreement—which addresses most if not all of the State's professed concerns.

## ***3. Parallel Merger Challenges and the State's Refusal to Consolidate***

The State's approach to this merger litigation is unprecedented. Before this merger, no State in history had ever filed a pre-closing challenge seeking to enjoin a merger on a nationwide

basis under state law.<sup>106</sup> Instead, when states have challenged mergers in the past, they have done so under *federal* law, in coordination with other states, and usually in conjunction with federal authorities. *See, e.g.*, *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 198 (S.D.N.Y. 2020) (noting Colorado sued alongside the U.S. Department of Justice but later withdrew).

In accordance with that longstanding practice, on March 29, 2024, Kroger and Albertsons formally invited the State to join the FTC Action as a plaintiff.<sup>107</sup> The State responded on April 25, 2024, declining to join the FTC Action.<sup>108</sup> The State’s response did not explain its refusal to coordinate with the parties in the FTC Action. To the contrary, when this Court asked: “Couldn’t the State join the FTC action in Oregon?,” the State replied, “We could have, Your Honor, but there was no requirement on us to do that.” Mar. 25, 2024 Hr’g Tr. at 13 (A. Biller). The State offered no further explanation for its refusal to join the FTC Action.

Instead of coordinating with other regulators, the State has piled onto the four other lawsuits that also challenge this merger. *See* Defs.’ Mot. for Permanent Inj. Hr’g Date (Mar. 13, 2024) (detailing parallel cases). Most relevant here, on February 26, 2024, the FTC, joined by eight states and the District of Columbia, sued Kroger and Albertsons (but not C&S) in the District of Oregon to enjoin the transaction under Section 7 of the Clayton Act. Compl., *FTC v. Kroger Co.*, No. 3:24-CV-347 (D. Or. Feb. 26, 2024). The FTC Complaint alleges harm in Colorado markets. *Id.* ¶ 52. The court in the FTC Action set an evidentiary hearing on the plaintiffs’ preliminary injunction motion, which is scheduled to begin on August 26, 2024. *Id.*, ECF No. 74. The court in the FTC Action has ordered that “Kroger and Albertsons shall not consummate the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after the

<sup>106</sup> *See generally* Defs.’ Mot. to Dismiss (“Defs.’ MTD”) (filed Mar. 21, 2024).

<sup>107</sup> Kroger and Albertsons’ March 29, 2024 Letter to P. Weiser at 2 (Ex. 48).

<sup>108</sup> S. Kaufmann’s April 25, 2024 Letter to M. Wolf *et al.* (Ex. 49).

court rules on the FTC’s motion for a preliminary injunction, or until after the date set by the District Court, whichever is later.” *Id.*, ECF No. 14 at 1-2.

The State’s request for a preliminary injunction in this case will thus be legally meaningless except in the scenario where the court in the FTC Action has ruled *in Defendants’ favor*, thereby creating a direct conflict between this Court and the U.S. District Court for the District of Oregon.

#### **4. Fact and Expert Discovery and Hearing Schedules**

The State’s decision to file its Motion on the same day as its Complaint has created an unprecedented procedural posture. Despite the existing protections of the stipulated order in the FTC Action, the State in this case has demanded multiple evidentiary hearings before the same tribunal on the same legal issues. This Court is accordingly scheduled to hold two evidentiary hearings in two months: (1) a “preliminary” injunction hearing lasting nine days starting on August 12, 2024; and (2) a permanent injunction hearing lasting 14 days and scheduled to begin on September 30, 2024. *See* Case Mgmt. Order (June 10, 2024).

**Fact Discovery.** Although the State has demanded the earliest evidentiary hearing in all the parallel judicial proceedings, it has repeatedly argued that it has insufficient time to complete discovery before that August 12 hearing. *See, e.g.*, June 10, 2024 Hr’g Tr. at 9-11, 23, 38-40 (A. Biller). Accordingly, the State has sought (and received) a two-phase discovery process to account for its professed inability to prepare fully for any merits trial in August. *See, e.g.*, June 10, 2024 Hr’g Tr. at 23 (A. Biller) (“Another two weeks, I still don’t think is enough time.”).

**Expert Discovery.** The State’s approach to expert discovery presents the same one-sided posture, allowing for (1) an expert discovery deadline before the preliminary injunction hearing and; (2) another deadline for the permanent injunction hearing. Pursuant to the Case Management Order, the State disclosed four expert witnesses on May 31, 2024. Yet when the State served its

initial expert reports for the preliminary injunction hearing on June 17, 2024, it served only *one* report, for economist Dr. Nitin Dua.

The State directed Dr. Dua to *not* address the Amended Divestiture Agreement in his initial report. Dua Rep. at 1 (Ex. 2). Meanwhile, Defendants' expert reports are not due until July 8, after this brief is filed. This schedule thus provides Defendants' experts with no opportunity to address the State's actual theory of the case regarding the Amended Divestiture Agreement.

**Briefing Schedule.** Under the current briefing schedule, the State will make arguments regarding its own expert report for the first time in Reply. And the State's Reply will be the first time the State articulates its position regarding the Amended Divestiture Agreement (assuming it does not continue to ignore it). Unless the Court grants Defendants a sur-reply, they will be forced to respond to all the State's arguments for the first time at the preliminary injunction hearing.<sup>109</sup>

#### **D. The State's Motion in Limine to Exclude Divestiture Evidence**

On April 8, 2024, the State filed a motion in limine seeking to preclude Defendants from presenting any evidence of their Amended Divestiture Agreement at the preliminary injunction hearing. After full briefing and a hearing on the merits, the Court denied the State's motion. Excluding the divestiture, the Court noted, would be the equivalent of what other courts have called ignoring “the elephant in the room.” MIL Hr’g Tr. at 82 (May 31, 2024). The Court therefore reasoned that “it is appropriate for the Court to consider [evidence of the Amended Divestiture Agreement] at the preliminary injunction hearing.” *Id.* The State chose not to amend or supplement its Motion to address this material factual development, despite now knowing about it for more than two months.

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<sup>109</sup> Given the State’s procedural maneuvering, Defendants expect to seek leave to file a sur-reply.

## E. Expert Testimony Regarding Modern Grocery Competition

The parties' experts in this case will offer economic opinions on critical issues, including the relevant market definition.

### 1. *The State's Single Economic Expert*

The State disclosed four experts in its pre-trial filing, but it submitted a report from just one of them (Dr. Nitin Dua) at the expert deadline of June 17, 2024.

Dr. Dua defines the "relevant product market" [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

Dr. Dua defines the relevant geographic market [REDACTED]

In assessing alleged competitive harm, Dr. Dua ignores Defendants' binding Amended Divestiture Agreement, stating that he intends to address it in rebuttal. *Id.* at 1.

## 2. Defendants' Anticipated Experts

Defendants' expert reports are not due until July 8. By way of proffer, however, Defendants anticipate submitting at least four experts for the preliminary injunction hearing.

**Dr. Mark Israel.** Dr. Israel is an economist specializing in industrial organization and the President of Compass Lexecon. Dr. Israel will testify about the likely competitive effects resulting from the merger, which includes the divestiture of all but 14 Safeway stores in Colorado. Dr. Israel's analysis will show that Colorado's proposed product market does not align with the modern retail grocery landscape, artificially excluding competitors that are important to Colorado consumers, including, among others, Whole Foods, Costco, Sam's Club, and Trader Joe's.

By analyzing data on how much consumers spend at Kroger's and its competitors' stores (known as "share-of-wallet" data), Dr. Israel will explain how Kroger's customers spend more of their grocery "wallet" at Walmart and Costco than they do at Safeway or any other competitors in Colorado. Dr. Israel will explain how the State's market definition improperly ignores the fact that Kroger sets prices primarily against Walmart and will have every incentive to continue to do so after the merger, corroborating the fact testimony of Kroger executives with data-driven analysis. *See supra* at 13.

Dr. Israel will also show how Colorado's one-size-fits-all approach to geographic market definition fails to account for market realities. The State's rigid "city area" approach breaks down many relevant markets along artificial lines, inappropriately discounting the importance of major competitors that fall just outside of those lines. Further, the State's approach fails to appropriately consider how the competitive options for consumers differ based on where in a "city area" they live or their grocery shopping preferences. The State also fails to address the fact that club stores and supercenters compete with Kroger from greater distances than Safeway.

After demonstrating the unreliability of the State's analysis, Dr. Israel will provide multiple, complementary analyses of the likely competitive effects of the transaction, using well-accepted economic methods that do not ignore important competitors or draw markets based on arbitrary circles around Kroger or Albertsons stores. These analyses capture numerous factors the State overlooks or minimizes, including the differentiation of stores' grocery offerings, consumer demographics, and the relative geographic proximity of stores to customers. Rather than performing monolithic effects analyses unmoored from modern grocery shopping behavior—as Dr. Dua has done—Dr. Israel's analyses will account for variability in consumers' competitive options based on their location and key demographic characteristics. These analyses will confirm that the proposed transaction, including the divestiture of 91 stores in Colorado, will not substantially lessen competition in the State.

**Rajiv B. Gokhale**, an expert in financial economics and an Executive Vice President at Compass Lexecon, will testify as to the efficiencies that Kroger expects the merger to produce. *See supra* at 22-23. Mr. Gokhale will testify that the underlying data and analyses used to identify these efficiencies are reasonable, and that a significant portion of the projected efficiencies are merger-specific, verifiable, and do not arise from anticompetitive reductions in output or service. Kroger plans to reinvest the efficiencies generated by the transaction to lower prices and improve shopping experiences for customers at stores nationwide, including in Colorado.

**Dan Galante** is a Managing Director of the Berkeley Research Group and expert on mergers and acquisitions, with experience as an advisor on over eight hundred transactions. Mr. Galante will testify that the merging parties and C&S engaged in a robust due diligence process related to the divested business, and that C&S is a strong buyer who will receive all necessary assets and transitional support to maintain competition. Mr. Galante will also testify that the

divestiture process was supported by experienced management teams and sophisticated external advisors who identified and developed a plan to mitigate risks associated with the sale.

Defendants also expect to present **Herb Kleinberger**, a retail industry expert with more than 25 years of experience consulting with retailers on business, operations, and IT strategy. Mr. Kleinberger will testify about the evolution of the grocery retail industry, including changes in consumer grocery shopping behavior and the emergence of a variety of grocery retail formats, which offer consumers multiple grocery shopping options.

### **LEGAL STANDARD**

The State bears the burden to show that the “extraordinary relief” of a preliminary injunction is necessary. *See Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982). A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see Rathke*, 648 P.2d at 651. “The need for caution in issuing a preliminary injunction is particularly important in the merger and acquisition context, because the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.” *FTC v. Foster*, 2007 WL 1793441, at \*51 (D.N.M. May 29, 2007) (quotation marks omitted).

“In considering a motion for a preliminary injunction, the trial court must find that the moving party has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) lack of a plain, speedy, and adequate remedy at law; (4) no disservice to the public interest; (5) balance of equities in favor of the injunction; and (6) preservation by the injunction of the status quo pending a trial on the merits.” *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007) (citing *Rathke*,

648 P.2d at 653-54). “If each criterion is not met, injunctive relief should not be granted.” *Id.*; see *California v. Am. Stores Co.*, 495 U.S. 271, 275 (1990).<sup>110</sup>

Thus, the State must produce evidence in support of every element of its claim under the Colorado Antitrust Act. See *Gitlitz*, 171 P.3d at 1278. And courts regularly deny injunctive relief in merger cases when the government fails to meet its burden. See, e.g., *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 528 (E.D. Pa. 2020); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015); *FTC v. Lab. Corp. of Am.*, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011); *FTC v. Foster*, 2007 WL 1793441 (D.N.M. May 29, 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

## **ARGUMENT**

This Court should deny the State’s bid to preliminarily enjoin the merger. Although the State bears the burden on every *Rathke* criteria, the Motion fails to offer sufficient evidence on any of them. Unlike virtually every other plaintiff in antitrust merger litigation, the State elected to file its brief in support of its motion for a preliminary injunction the same day it filed its Complaint, before it served expert reports and before any witnesses had been deposed. And despite having a “stack of hard drives … with terabytes of data that were produced” before this litigation even began, Hr’g Tr. at 34 (Mar. 25, 2024) (A. Biller), the State’s brief offers only the “basic facts” of the case, with the bare assertion that “[a]n additional factual record will be developed after further discovery,” Mot. v n.1. The State has thus made it impossible for Defendants to address the actual case it intends to present at the upcoming hearing. See *supra* at 26-28.

The State’s basic failure to submit sufficient evidence in support of the preliminary injunction criteria is fatal to its Motion, and its evidentiary failing pervades every aspect of the

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<sup>110</sup> As explained *infra* at 64, no exceptions to *Rathke*’s six-part test apply.

preliminary injunction test. Accordingly, there are multiple, independent grounds to reject the State's unprecedented request for this Court to enjoin a \$24.6 billion merger nationwide.

**I. THE STATE CANNOT DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS OF ITS CLAIM UNDER THE COLORADO ANTITRUST ACT**

The State dramatically understates its burden to obtain the extraordinary relief of a preliminary injunction, particularly as it relates to the merits of its claim under the Colorado Antitrust Act. *See Gitlitz*, 171 P.3d at 1278. The State appears to believe it can satisfy its "success on the merits" burden *without any economic or expert evidence* and without even articulating which competitors are included (and which are excluded) in its proposed product market. *See Mot. v & n.1; Mot. 30 n.28* (promising to produce expert evidence later). The State is wrong.

To demonstrate the flaws in the State's approach, this Section: (A) sets forth the legal framework that the State must satisfy to show a reasonable probability of success on the merits, including the *Baker Hughes* burden-shifting framework; (B) demonstrates that the State has failed to meet its *prima facie* burden under that standard; (C) explains that Defendants have met their burden of production to undermine the State's *prima facie* case; and (D) summarizes why the State cannot satisfy its burden of persuasion under any balancing of the evidence.

**A. The State Bears the Burden to Show a Reasonable Probability that the Merger Will Substantially Lessen Competition**

The State's likelihood of success on the merits turns on its ability to show that the merger is likely to "substantially lessen competition." C.R.S. § 6-4-107(1). In applying this standard, "decisions of federal courts construing the Sherman and Clayton Acts, although not controlling, are entitled to careful scrutiny in resolving issues arising under Colorado's antitrust statute." *People ex rel. Woodard v. Colo. Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1061 (Colo. 1984).

The Clayton Act prohibits mergers only where a plaintiff has established a “reasonable probability” that the proposed merger will “substantially” lessen competition. *United States v. AT&T Inc.*, 916 F.3d 1029, 1932 (D.C. Cir. 2019) (citation omitted). The “mere possibility” of harm to competition is insufficient. *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 189-90 (D.D.C. 2018) (citations omitted), *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (Thomas, J.).

Contrary to the State’s suggestions, Mot. 51-52, the Clayton Act does not require merging parties to “preserve exactly the same level of competition that existed before the merger.” *United States v. UnitedHealth Grp., Inc.*, 630 F. Supp. 3d 118, 133 (D.D.C. 2022). Indeed, as courts have recognized, adopting the State’s “proposed standard would effectively erase the word ‘substantially’ from [the statute].” *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1058-59 (5th Cir. 2023) (quoting *UnitedHealth*, 630 F. Supp. 3d at 133).

Courts typically analyze a horizontal merger’s likely effect on competition using the three-part burden-shifting framework from *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990). Under this framework, the burden of persuasion “remains with the [plaintiff] at all times,” but the burden of *production* shifts between the plaintiff and the defendant. *Id.* at 982-83.

*First*, the State must produce evidence to “establish a *prima facie* case that a merger is anticompetitive.” *DeHoog v. Anheuser-Busch InBev SA/NA*, 899 F.3d 758, 763 (9th Cir. 2018) (citation omitted). The State can meet this burden “[b]y showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area.” *Baker Hughes*, 908 F.2d at 982.

A “threshold step” in this phase is “to accurately define the relevant market, which refers to ‘the area of effective competition.’” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020)

(quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018)). “[D]etermination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act.” *Demartini v. Microsoft Corp.*, 662 F. Supp. 3d 1055, 1061 (N.D. Cal. 2023) (quoting *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015)). “[W]ithout a definition of [the] market, there is no way to measure the defendant’s ability to lessen or destroy competition.” *Concord Assocs., L.P. v. Entm’t Props. Tr.*, 817 F.3d 46, 53 (2d Cir. 2016).

Broadly, the State’s burden requires it to show a likelihood of competitive harm in a *specific* market following the merger. More specifically, if the State accurately defines the relevant product and geographic market(s), it must then analyze whether the merger will result in “undue concentration” in one or more of those markets, typically through an assessment of post-merger market shares or other structural evidence. *Baker Hughes*, 908 F.2d at 982-83. That analysis must account for “the *entire* transaction in question,” including any divestiture. *FTC v. Arch Coal, Inc.*, 2004 WL 7389952, at \*3 (D.D.C. July 7, 2004); *see also AT&T, Inc.*, 916 F.3d at 1040-41 (considering no-blackout commitments and arbitration agreement offers in determining government failed to meet its burden); *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1093 (N.D. Cal. 2023). To allow otherwise would permit the State to “meet its *prima facie* burden with market-share statistics that have no connection to the post-acquisition world.” *UnitedHealth Grp.*, 630 F. Supp. 3d at 133.

For that reason, the State bears the burden at the first step of the burden-shifting framework to show why the transaction—taking the divestiture into account—would substantially lessen competition. *See UnitedHealth*, 630 F. Supp. 3d at 140 (“Under what the Court believes is the correct legal standard, [the divestiture evidence] prevents the Government from meeting its *prima*

*facie* burden.”). The divestiture is part the merger, and it is an essential component of what the Court is being asked to evaluate. *See* MIL Hr’g Tr. at 82 (May 31, 2024). There can be no accurate assessment of post-merger market shares without accounting for what the division of shares in the alleged market *actually* will be post-merger. *See Arch Coal*, 2004 WL 7389952, at \*3; *see also Microsoft Corp.*, 681 F. Supp. 3d at 1093 (rejecting FTC’s argument that litigating-the-fix evidence has no “relevance to [the government’s] *prima facie* burden”).

In short, because Defendants do not bear any burden at step one, Defendants need not prove that C&S is a viable divestiture buyer. By challenging the viability of the divestiture, the State is asking this Court to substitute its own business judgment in place of C&S’s, and the State bears the burden to justify that exceptional request.

*Second*, if the State makes a *prima facie* case, the burden of production shifts to Defendants to present evidence that the merger would not substantially lessen competition. *Baker Hughes*, 908 F.2d at 982-83. The types of evidence a defendant may rely on at this stage are myriad, including evidence related to “industry structure,” “changing market conditions,” “the nature of the product and the terms of sale,” the relative “significance of market shares and concentration” in a given market, the sufficiency of existing competitors in the market to replace any potential loss of competition, “ease of entry” by new competitors, the potential for coordination between the merging firms, and the prospect of efficiencies resulting from the merger. *Id.* at 985-86 (collecting sources). The ultimate question is whether a defendant has produced sufficient evidence to “show that the *prima facie* case inaccurately predicts the relevant transaction’s probable effect on future competition,” such as by “showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government’s favor.” *Id.* at 991.

Defendants' burden at this stage is one of *production*, not persuasion; the burden of persuasion remains with the State "at all times." *Id.* at 983. So even if the Court were to treat the divestiture as part of step two, Defendants would need only to *produce* evidence of the divestiture and its effect on competition. *See UnitedHealth*, 630 F. Supp. 3d at 140 (observing that even "under the Government's preferred standard, the [divestiture] evidence enables [the defendant] to meet its burden at the rebuttal stage, and the Government provides no additional evidence to carry its burden of persuasion"). No matter what, the State has the burden to persuade the Court that C&S's investment is unlikely to provide any meaningful competition. *See id.*

*Third*, after Defendants satisfy their rebuttal burden of production, the burden of production shifts back to the State, which must produce "additional evidence of anticompetitive effect[s]." *Baker Hughes*, 908 F.2d at 983. The State retains "the ultimate burden of proving a [Clayton Act] violation by a preponderance of the evidence," and a "failure of proof in any respect will mean the transaction should not be enjoined." *AT&T Inc.*, 310 F. Supp. 3d at 189 (citations omitted).

## **B. The State Has Not and Cannot Satisfy Its Prima Facie Burden**

To establish a prima facie case, the State has the burden to: (1) define a relevant product market, (2) define a relevant geographic market, and (3) demonstrate likely harm in that specific market. The State has neither established a relevant market nor shown harm in any such market.

### **1. *The State Fails to Establish a Relevant Product Market for the "Retail Sale of Food and Other Grocery Products"***

The State's inadequate market definition dooms its case. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act."); *see Am. Express*, 138 S. Ct. at 2285.

a. Legal Standard for Defining Product Markets

Defining a relevant product market is inherently a question of consumer demand, or “demand substitution.” *See FTC v. Tronox Ltd.*, 332 F. Supp. 3d at 187, 198 (D.D.C. 2018); *see also FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 45 (“[T]he touchstone is demand substitution.”). Demand substitution describes “customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.” *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020) (citing FTC-DOJ Horizontal Merger Guidelines § 4 (2010)). Demand substitution thus polices the “outer boundaries of a product market” and is governed by either (1) consumers’ “reasonable interchangeability of use” or (2) the “cross-elasticity of demand” (price sensitivity) between a product and substitutes for it. *Brown Shoe*, 370 U.S. at 325.

As courts recognize, the “reasonable interchangeability” principle contemplates that “[p]roducts in the same market need not be identical, only reasonable substitutes.” *See, e.g., United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 436 (D. Del. 2017); *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, 65 F. Supp. 2d 1052, 1059 (N.D. Cal. 1998) (“The services need not be identical to be considered reasonably interchangeable.”). Accordingly, “[w]hen aggregating products into a relevant market, courts focus on demand substitution because it illuminates whether customers can switch to one product and constrain anticompetitive pricing in another.” *RAG-Stiftung*, 436 F. Supp. 3d at 292 (citations omitted). “For instance, if customers would switch from Jif peanut butter to Peter Pan following a price increase, those two products are more likely to be included in a relevant product market.” *Id.*

To help define a “relevant product market,” courts often use what is called the “hypothetical monopolist test.” FTC & DOJ Horizontal Merger Guidelines § 4.1.1 (2010). The test asks whether a hypothetical monopolist controlling the products in the alleged market could

profitably impose a small but significant and non-transitory increase in price (“SSNIP”), generally assumed to be about five percent, “on at least one product in the market.” *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016). If a hypothetical monopolist can profitably impose a SSNIP, the products may compose a relevant market. *Id.* at 121.

Applying that test, it is not sufficient for the State to show that *some* consumers would remain in the candidate market in response to a price increase. Rather, to satisfy the hypothetical monopolist test, the State must show that enough customers would remain such that the price increase would be profitable. *See, e.g., United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 192 (D.D.C. 2001) (although the evidence showed that some customers could not switch to a substitute product, the government failed “to show whether this captive group is substantial enough that a hypothetical monopolist would find it profitable to impose such an increase in price”); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (“[I]t is possible for only a few customers who switch to alternatives to make the price increase unprofitable.”).<sup>111</sup>

#### b. The State Fails to Define a Relevant Product Market

The State’s proposed product market is contradictory, unsupported by the evidence, and divorced from the realities of modern consumer behavior. It bears no relationship to consumer demand, and it provides no rational baseline for Defendants (or this Court) to assess the State’s theory of competitive harm.

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<sup>111</sup> Courts have used what are called the “the *Brown Shoe* factors” to help define the relevant market. Those factors include: “industry or public recognition of the [relevant market] as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe*, 370 U.S. at 325. “[T]he *Brown Shoe* indicia are practical aids for identifying” markets, but “their presence or absence does not decide automatically” the issue of market definition. *Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1375 (9th Cir. 1989). In all instances, the touchstone for determining a relevant product market is consumer demand. *Brown Shoe*, 370 U.S. at 325.

*First*, while the State acknowledges that proving a relevant market is part of its *prima facie* case, Mot. 24, it offers no evidence to support its proposed market definitions. Instead, its paragraph-long product-market definition simply repeats the Complaint's conclusory allegations without any evidentiary support. The State claims: "The relevant product market here is food and other grocery products available for retail sale in Supermarkets," and it defines a "supermarket" as a "full-line retail grocery store that enables customers to purchase substantially all of their food and grocery shopping requirements in a single shopping visit with substantial offerings in each of" a long list of product categories. Mot. 27; *see* Compl. ¶ 80.

After that evidence-free description of the product market, the State offers an equally unilluminating application of the hypothetical monopolist test, consisting of just two sentences: "Here, the vast majority of Supermarket customers are not likely to start shopping at other types of stores in response to a SSNIP. A relevant product market comprised of Supermarkets therefore passes the Hypothetical Monopolist Test." Mot. 30. These two conclusory sentences—unsupported by evidence or explanation—fall far short of carrying the State's burden.

The State's evidentiary failure is a problem of its own creation. The State filed its Motion the same day as its Complaint, relying on conclusory allegations to satisfy its burden, and arguing that "[t]he evidence presented with [its] motion sets forth the basic facts to establish the need for a preliminary injunction." Mot. v & n.1. The State is wrong. In fact, the State even appears to acknowledge its evidentiary deficiencies, recognizing the need to produce further evidence (including critical expert testimony) at a live hearing in the first instance. *Id.* at v & n.1; *id.* at 30 n.28; *id.* at 31; *id.* at 33. Those concessions reflect the reality that defining a relevant market depends on an economic analysis that requires expert evidence. *See, e.g., Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1234 (N.D. Ala. 2011) ("Eleventh

Circuit precedent requires an antitrust plaintiff to proffer expert testimony to establish a relevant product market and a relevant geographic market.”) (surveying caselaw), *aff’d*, 721 F.3d 1281 (11th Cir. 2013); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 599 (1st Cir. 1993). The law does not permit the “extraordinary relief” of a preliminary injunction based on the State’s proffer that it will produce evidence at a future date. Its failure to present any evidence on the critical element of the product-market definition is dispositive here.

*Second*, the State’s proposed product market rests on a concept of “one-stop shopping,” Mot. 4, that is “inconsistent with the commercial realities of the industry,” *RAG-Stiftung*, 436 F. Supp. 3d at 292. The State offers no basis for using “one-stop shopping” as a principle to define a product market. As the data demonstrates, consumers increasingly shop at a diverse array of stores for their groceries and household goods, with less than 7% of them shopping at just one store. *Supra* at 10-11. More broadly, the USDA has reported an 18% decrease in consumer spending at grocery stores from 1997 to 2022, while consumer spending on food at club stores (e.g., Costco) and supercenters (e.g., Walmart) nearly tripled. *Supra* at 12. Data on consumer shopping behavior confirms that reality, indicating that Kroger customers spend [REDACTED] [REDACTED] of their grocery budget at non-Kroger stores. *Supra* at 11-12.

The modern consumer also purchases grocery products from e-commerce grocery options like Amazon, and delivery services such as Instacart and Shipt, which enable customers to access a variety of retail options outside the geographic area where consumers live or work. The COVID-19 pandemic only advanced the fragmentation and diversification of grocery shopping patterns. Yet despite the drastic shifts in the grocery-buying landscape over the past decades, the State clings to the notion that grocery consumers push their carts down the aisle of their local grocery store every week to purchase all or “substantially all of their food and grocery shopping requirements

in a single shopping visit.” Mot. 4. The State’s ignorance of e-commerce as a competitive force defies reality.

*Third*, the State also ignores the fact that a range of differentiated retailers offer the same “grocery and consumable” products in the State’s alleged product market. Consumers pick and choose between a range of differentiated retail grocery options to meet their grocery shopping preferences. According to the State, consumers do not buy soap, zip-lock bags, or other goods at “dollar stores” because those stores do not *also* “carry fresh produce, meat, or seafood.” Mot. 28. According to the State, Costco is not a substitute for a consumer because Costco does “not offer the same depth and product variety as do Supermarkets.” *Id.* And according to the State’s expert, Whole Foods is not a substitute for a consumer because Whole Foods [REDACTED]

[REDACTED] See Dua Rep. at 38 (Ex. 2). (Apparently, the State’s one-stop shopper is not “affluent.”). In effect, the State defines the product market to include Kroger and Albertsons only and then reverse-engineers a hypothetical shopper who refuses to go elsewhere.

The problem is that the State’s product market must account for *all* consumers, not just the State’s hypothetical one-stop shopper. As the Tenth Circuit has long recognized, “[t]he reality [is] that customers simultaneously can, and routinely do, choose to patronize competitors of all stripes offering fungible goods through different but overlapping distribution channels.” *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1221 (10th Cir. 1986). If customers *can* use those other channels—*e.g.*, club stores, dollar stores, and “natural organic” stores—to protect themselves from a price increase in its alleged product market, then the State’s “traditional-supermarket-only” theory is not a separate market for purposes of the antitrust laws.

*Fourth*, the State has not defined a product market around a “full basket” or “cluster” of grocery products—nor could it. In some instances, courts permit plaintiffs to define a market by

showing that “if most customers would be willing to pay monopoly prices for the convenience of receiving certain products as a package, then the relevant market for those products is the market for the package as a whole.” *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014) (quotation marks omitted); *see Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 354-55 (S.D.N.Y. 2009) (no cluster market where the plaintiff failed to show higher prices for clustering). But the State has not even attempted to establish any coherent “cluster” theory here, instead simply listing the categories of products that Kroger and Albertsons offer—from “fresh fruit” to “beer”—and declaring that the “product market” includes those products, but only when they are sold at Defendants’ stores. *See United States v. U.S. Sugar Corp.*, 73 F.4th 197, 205 (3d Cir. 2023) (rejecting proposed market because “defining the product market to include production and sale is irrelevant to consumer welfare and a purely self-serving description by the government”).

*Fifth*, the State’s proposed product market is facially under-inclusive. For example, while the State claims that competitors like Costco fall outside the relevant product market, Costco meets its definition of a “supermarket”: It is a “full-line retail grocery store that enables customers to purchase substantially all of their food and grocery shopping requirements in a single shopping visit,” and has “substantial offerings” in all (or nearly all) the State’s product categories. Mot. 27. So too for the litany of other stores throughout the State—including Whole Foods, Sprouts, Natural Grocers, Clark’s, and Esh’s—all of which the Motion fails to mention. *Supra* at 7-10.

Even the State’s expert Dr. Dua acknowledges that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dua Rep. at 10 (Ex. 2). Yet Dr. Dua excludes competitors like Whole Foods from his market definition, apparently concluding that it does not compete with Kroger and

Albertsons even in affluent and health-conscious cities like Boulder. *See id.* at 59 ( [REDACTED] [REDACTED] ).

[REDACTED]). In short, the State’s amorphous product-market definition lacks any analytical basis.

*Sixth*, the *Brown Shoe* factors referenced by the State, Mot. 26, demonstrate that the relevant market is far broader than the State contends. For example, there is no “distinct consumer” in the grocery industry; consumers from all different backgrounds shop at a range of grocery retailers. *See Brown Shoe*, 370 U.S. at 325. Indeed, the State’s myopic focus on a hypothetical “distinct consumer” (the one-stop shopper) is precisely why its proposed product market fails to reflect the “commercial realities of the industry.” *Id.* at 337. Similarly, the testimony and ordinary course documents of virtually every third-party deposed in this litigation confirm that retail grocery competition is expansive. *Supra* at 7-10, 15-17. The “industry” and “public recognition” factors demonstrate that the product market for retail groceries extends far beyond the State’s narrow picture of “supermarket” competition. *Brown Shoe*, 370 U.S. at 325. *Brown Shoe*’s practical indicia thus undermine the State’s gerrymandered definition of the relevant product market.

*Finally*, the State attempts to rely on evidence of competition between Defendants to define its market, Mot. 28, but the mere existence of horizontal competition does not define a market. Rather, as the D.C. Circuit has explained, the “definition of [a] product market … ‘focuses solely on demand substitution factors,’ *i.e.*, that *consumers* regard the products as substitutes.’” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718 (D.C. Cir. 2001) (emphasis added). The question is not whether “[s]upermarket pricing is constrained by pricing at other [s]upermarkets,” Mot. 28, as the State bluntly suggests. Rather, the question is whether there will be *other* competitive constraints on a post-merger company. Yet while the State apparently concedes that Walmart is in the product

market, Mot. 28, it fails to address the competitive constraints provided by the array of other grocery retailers in Colorado and across the country that compete with Kroger and Albertsons.

Each of these points shows that the State fails to properly define a product market. Together, they fundamentally undermine the State's case.

**2. *The State's Vague "Highly Localized" Geographic Markets Are Unsupported***

The State also fails to define a relevant geographic market. A properly defined geographic market includes the “sellers or producers who have the ... ‘ability to deprive each other of significant levels of business’” within a given geographic area. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (citation omitted). Like a product market, a geographic market must “correspond to the commercial realities of the industry.” *Brown Shoe*, 370 U.S. at 336 (quotation marks omitted).

The State’s proposed geographic market lacks any factual grounding. Instead, it copies the Complaint’s generalized allegations of geographic markets in “39 city areas,” without offering any evidence to support that definition. *See* Mot. 31 (“The Attorney General will present evidence at a hearing related to ... 39 city areas.”). The State appears to acknowledge its evidence is insufficient, stating that “[a]dditional discovery and expert analysis will be needed to further refine the relevant geographic markets.” Mot. 30 n.28. But as courts interpreting the Clayton Act have cautioned, “alleged anticompetitive effects of a merger must be examined in the context of *specific ... geographic markets.*” *United States v. Int'l Tel. & Tel. Corp.*, 342 F. Supp. 19, 52 (D. Conn. 1970) (emphasis added). The State’s failure to provide evidence of its proposed geographic market precludes the State’s request for “extraordinary relief.”

The State’s evidentiary failing is no mere technicality. Without clarity on how the State intends to define “city areas” in light of the Amended Divestiture Agreement, Defendants face a

moving target. *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978) (plaintiffs failed to meet their burden because “of their failure adequately to define and to prove the relevant market, which is ‘a necessary predicate’ for evaluating [merger] claims under” the Clayton Act (citation omitted)). And even without the divestiture, the State’s own sources are confused. While the State’s Motion identified 39 “city areas” in which competition would be constrained, the State’s expert has inflated that number to [REDACTED]. Dua Rep. at 4 (Ex. 2). Dr. Dua does not acknowledge this inconsistency, and it is unclear how he reached a different “geographic market” tally from the State itself.

Dr. Dua’s alternative approach of analyzing competition in [REDACTED]

[REDACTED] also fails to account for the modern grocery-shopping experience. Dua Rep. at 4 (Ex. 2); *see* Mot. 34. Simply drawing circles around stores does not provide an accurate picture of modern grocery-buying dynamics. Even the minimal analysis of geographic markets that the State has provided demonstrates three critical flaws.

*First*, the State treats all grocery retailers as having the same geographic-draw area, but economic evidence suggests that consumers do not. For example, the evidence will show that customers will travel farther to shop at stores like Costco and Walmart than they will for Kroger. Defining a market by drawing a 3-mile circle would fail to account for a Costco 3.1 miles away from a Kroger store, even though consumers may consider that Costco a substitute for the Kroger.

*Second*, the State’s Motion does not account for online retailers—including Amazon—that offer *identical* products that the State itself contends are quintessential “Supermarket” offerings. *See* Mot. 4-5 (listing products). Amazon’s offerings are not merely “reasonably interchangeable”; they are *exactly* interchangeable: The exact same box of cereal available at a store can be purchased on Amazon from the comfort of a living room. The same is true of other boxed goods,

paper goods, detergent, and so on. The State fails to acknowledge, let alone address, the effect that retailers like Amazon—who have virtually no geographic limitations—have on the relevant geographic market in this case. The State’s model likewise fails to acknowledge grocery delivery services like Instacart, which allow customers to access more distant stores. Instacart and other platforms also allow customers to buy from club stores without a membership, further increasing their choices.<sup>112</sup>

*Third*, the State’s geographic analysis rests on the concept that customers “shop at stores close to where they live.” Mot. 30. But this analysis is incomplete. As the evidence will show, the geographic market depends on much more than the proximity of a store to a customer’s home. Customers shop at different stores based on their preferences and demographics. Customers shop at stores near their offices, schools, daycares, and other routine locations. The State’s rigid geographic model ignores those realities.

### **3.     *The State Cannot Establish Harm in Any Relevant Market***

Even if the State had adequately defined geographic and product markets, it must still show a likelihood of harm *in those markets*. *See RAG-Stiftung*, 436 F. Supp. 3d at 291. It falls well short of satisfying its burden. *Baker Hughes*, 908 F.2d at 982.

#### **a.     The C&S Divestiture Torpedoes the State’s Prima Facie Case**

The State is uniquely ill-suited to claim harm from this merger because the Amended Divestiture Agreement has resolved the key concerns that the Complaint identified. Accounting for the divestiture, the State cannot meet its burden of production or persuasion. Yet the State has failed to address the Amended Divestiture Agreement *at all* to date, *see* Dua Rep. at 1 (Ex. 2), betting its entire case on the theory that the divestiture is irrelevant to its prima facie burden. For

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<sup>112</sup> George Dep. at 42:4-13 (Ex. 3).

the reasons discussed above, the State is wrong as a legal matter, *supra* at 33-37, and this Court need not proceed further to deny the Motion. In any event, the State cannot carry its burden of persuasion even if this Court considers the divestiture as part of Defendants' rebuttal case.

*First*, the Amended Divestiture Agreement destroys the State's concerns about market-share concentration. In the real world, Kroger will acquire just 14 Albertsons stores in Colorado, divesting the remaining stores to C&S. Thus, the State's "market concentration" statistics must focus on those 14 Albertsons stores. Yet the State ignores those stores altogether.

*Second*, C&S is an experienced, well-capitalized grocery operator that will compete strongly with Kroger and others. Given its wholesale operations, C&S already supplies over 7,500 stores—three times as many stores as Kroger even owns. *Supra* at 19. Moreover, C&S has the industry know-how to succeed: It has more than a century of experience as a highly successful grocery company and provides a wide range of retail services to its independent grocery retailer customers, including retail technology and development, digital marketing, merchandising and pricing services, private brand support, and pharmacy network services. *Supra* at 19. Thus, C&S already provides many of the support services that it needs to run a retail store.

C&S is poised to successfully operate the divested stores. C&S already operates its own retail grocery stores under the banners "Piggly Wiggly Midwest" and "Grand Union," and it has no intention of selling those stores. *Supra* at 20. Indeed, the FTC has approved C&S as a divestiture buyer in a 2021 grocery merger. *Supra* at 20. And C&S's strength as one of the largest and most forward-thinking grocery wholesalers in the country uniquely supports C&S to successfully run the divested stores. *Supra* at 19-22.

*Third*, C&S has every incentive to compete with Kroger after the merger. Through the Divestiture, C&S has committed \$2.9 billion to an expansion of its grocery retail business. While

the State claims that C&S is purchasing stores at a “low” price that reflects the risk of the deal, it provides no economic support for that accusation. Mot. 62. No such evidence exists.

*Fourth*, the point of the divestiture is to resolve potential competitive concerns, and this Amended Divestiture Agreement is intended to ensure the future success of C&S. C&S is [REDACTED] a standalone business of nearly all of Albertsons Colorado’s stores. Those stores will operate in Colorado under the well-known Safeway banner ([REDACTED]  
[REDACTED]).

*Fifth*, the Transition Services Agreement (“TSA”), which is a binding part of the Amended Divestiture Agreement, ensures that C&S will be able to hit the ground running. The TSA provides that [REDACTED]

C&S will also receive supporting facilities, [REDACTED]  
[REDACTED]; it will receive five new private label brands, [REDACTED]  
access to the highly popular Signature and O Organics private brands, supplementing its existing private label offering. [REDACTED]  
[REDACTED]

[REDACTED]. *Supra* at 21.

*Finally*, the State’s repeated invocation of the unsuccessful Haggen divestiture demonstrates its lack of evidence regarding *this* divestiture to C&S. A single unsuccessful divestiture to a different buyer—among dozens of successful retail grocery divestitures—is insufficient to carry the State’s burden of production or persuasion. Indeed, the Haggen-divestiture saga was the product of a unique confluence of factors, detailed at length in the 97-page opinion regarding the company’s eventual bankruptcy. *See In re HH Liquidation, LLC*, 590 B.R. 211, 220

(Bankr. D. Del. 2018). Those same factors simply are not present here. Unlike Haggen, C&S is extremely well-capitalized. Indeed, it is the eighth-largest privately-owned company in the United States. *Supra* at 19. Unlike Haggen, C&S has a long history of operating in the grocery industry, providing the supply-chain network and logistical know-how to hit the ground running. And unlike Haggen, C&S was *previously approved* as a divestiture buyer by the FTC.

Divestitures happen all the time, and most of them succeed. The suggestion that this Court should reject C&S as a divestiture buyer because a different divestiture failed under markedly different circumstances only underscores the State's lack of evidence to contest C&S's viability as a divestiture buyer in *this* case.

b. The State Cannot Establish Market Concentration Statistics that Meet the Presumption of Harm

The State's vague, unsupported allegations of the effect of the merger on market concentration, Mot. 32-33, are facially insufficient. "Market concentration, or the lack thereof, is often measured by the Herfindahl-Hirschmann Index (HHI)." <sup>113</sup> *Heinz*, 246 F.3d at 716. Courts thus use HHI as a general heuristic to approximate when relevant product and geographic markets are concentrated enough to trigger a presumption of anticompetitive harm. To calculate HHI, however, the State must provide *actual* market-share concentration numbers both before and after the merger in a *specific* market. *See RAG-Stiftung*, 436 F. Supp. 3d at 310 ("The Court is unaware of a single case in which a court has enjoined a merger, even at this preliminary stage, where the

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<sup>113</sup> The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346 (3d Cir. 2016). "Squaring the individual market shares allocates proportionately greater weight to firms with larger shares, reflecting the larger threat to competitive behavior they pose." *RAG-Stiftung*, 436 F. Supp. 3d at 310 n.26. Thus, a higher HHI indicates a more concentrated market. For instance, under the 2010 Merger Guidelines, a transaction was considered presumptively unlawful if the relevant market would have a post-merger HHI score of 2,500 or more and if the merger would increase the HHI score by 200 points or more. *See* 2010 Guidelines § 5.3 at 19.

Government failed to show undue concentration in a relevant market as its *prima facie* case requires, almost always through an HHI or similar metric.”).

The State does not even attempt to show its work. Rather, the Motion claims in conclusory fashion the merger will result in an average change of around 1,400 in the HHI in all of the 39 “city areas” it alleged. *See Mot.* 33. The State does not say which competitors it included in its market concentration statistics; nor does it articulate the market concentration in any *specific* market. Instead, the State defers, claiming “the Attorney General will present expert economic evidence at a hearing.” *Id.* Thus, by the State’s own admission, its Motion fails to establish a presumption of anticompetitive effect with *evidence*. *See Baker Hughes*, 908 F.2d at 982.

The State’s perfunctory HHI calculation also fails to address the Amended Divestiture Agreement. Even if Dr. Dua had properly defined a relevant product and geographic market (as explained, he has not), his market-concentration statistics would still fail to say anything about actual post-merger concentration because they do not account for the divestiture to C&S.

c. The State’s So-Called “Qualitative” Factors and Alleged Harm to Consumers Are Easily Debunked

Perhaps due to its failure to support its market concentration statistics, the State leans on various “qualitative” factors that cannot satisfy its *prima facie* case.

*First*, the State argues that there will be harm in product markets that it does not allege as part of its claim: harm in the “labor market,” the market for “local supply,” and to “supply chain resiliency” generally. Mot. 36-41. Putting aside the fact that C&S is perhaps the foremost supply-chain specialist in the country, none of these vague arguments are relevant to the market for *consumer* goods, which is the only market alleged in this case. Mot. 27. Regardless, the evidence will show that C&S’s well-established grocery operations will compete with Kroger for employees and suppliers as well.

*Second*, the State's examples of harm in its Motion demonstrate how its failure to consider C&S dooms its arguments. It alleges a "monopoly" [REDACTED] after the merger, Mot. 41, [REDACTED]. It alleges a "duopoly" with Walmart in [REDACTED] Mot. 42, [REDACTED]. The consumers in those cities will enjoy the same number of grocery options before and after the merger. Or, put in "market concentration" terms, the HHI will not change at all.

*Third*, the State's evidence focuses almost entirely on proving that Kroger and Albertsons compete on price. Mot. 35. But the mere elimination of a horizontal rival is insufficient to demonstrate anticompetitive harm. *See, e.g., Demartini*, 662 F. Supp. 3d at 1064-65; *Malaney v. UAL Corp.*, 2010 WL 3790296, at \*7 n.11 (N.D. Cal. Sept. 27, 2010) ("Simply put, there is no support for the notion that, merely by removing one competitor, any horizontal merger in the airline industry will be anticompetitive and thereby violate Section 7."), *aff'd*, 434 F. App'x 620 (9th Cir. 2011); *Bradt v. T-Mobile US, Inc.*, No. 19-cv-07752, 2020 WL 1233939, at \*4 (N.D. Cal. Mar. 13, 2020); *In re AMR Corp.*, No. 22-901, 2023 WL 2563897, at \*1 (2d Cir. Mar. 20, 2023). And again, there will be no elimination of a horizontal rival: C&S will step into Albertsons' shoes as a competitor in Colorado on day one post-merger.

Moreover, the State's myopic focus on Albertsons' business documents (rather than Kroger's) underscores why prices will *decrease* following the merger. The State contends that Albertsons [REDACTED] Mot. 35, but it cannot say the same for Kroger, which has spent the past [REDACTED] [REDACTED] R. McMullen Dep. at 170-71. C&S also plans to make

expansive price investments in its newly acquired Albertsons stores to compete with Kroger.<sup>114</sup> The evidence will thus show that Albertsons is a higher-priced retailer than Kroger, and that Kroger's acquisition of Albertsons will *reduce* prices for consumers following the merger.

This point bears emphasis, because the State wants to ignore it: Granting the relief requested by the State in its Motion will result in *higher prices* for Colorado grocery shoppers than if the merger is permitted to go through.

### C. Even if the State Could Meet Its *Prima Facie* Burden, Defendants Would Rebut It

Even if the state could meet its *prima facie* burden, Defendants would have the opportunity to present rebuttal evidence. *Baker Hughes*, 908 F.3d at 982. If Defendants successfully rebut the *prima facie* case, the burden of production shifts back to the State “and merges with the ultimate burden of persuasion, which remains with the government at all times.” *Id.* at 983. “The standard for the quantum of evidence defendants must produce to shift the burden back is relatively low.” *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 213 (D.D.C. 2017), *aff’d* 855 F.3d 345 (D.C. Cir. 2017); *see also Baker Hughes*, 908 F.2d at 991 (defendants are not required to “‘clearly’ disprove anticompetitive effect,” but rather to make merely “a ‘showing’” (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963))).

Under the *Baker Hughes* framework, numerous factors can rebut a *prima facie* antitrust violation, even assuming market concentration exists. *See Baker Hughes*, 908 F.2d at 984 (“[E]vidence on a variety of factors can rebut a *prima facie* case.”). Among these factors are (1)

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<sup>114</sup> See Winn Dep. Day 1 at 120:21-121:17 (Ex. 41); Winn Dep. Day 2 at 467:22-470:14 (describing C&S’s plans to make improvement investments to the stores in Colorado that it is acquiring including investments in maintenance, remodels, security, inventory, and assortment) (Ex. 42); *see also* McGowan Dep. at 180:8-25, 181:5-18 (discussing C&S’s planned price investment of 180 million into re-banning, 90 million into private-label pricing, and an estimated half a billion into its newly acquired stores in the short-term) (Ex. 44).

the misleading nature of the statistics underlying the government’s *prima facie* case; (2) the absence of significant entry barriers in the relevant market; (3) the lack of a likelihood of express collusion or tacit coordination; and (4) the efficiencies the merger will generate. *Baker Hughes*, 908 F.2d at 985. Thus, even if the State had satisfied its *prima facie* burden, the *Baker Hughes* factors show that the merger will not result in the anticompetitive effects the State asserts.

*First*, even if the State had properly defined a relevant market, the HHI statistics on which the State relies to demonstrate concentration in that market do not tell the full story. As discussed above, *supra* at 50-52, the State’s statistics do not account for the divestiture. Failing to capture the divestiture means that the State’s statistics hold no weight. *See Microsoft*, 681 F. Supp. 3d at 1093 (regulators “must address the circumstances surrounding the merger as they actually exist”).

More fundamentally, binary market concentration statistics are ill-suited for the type of market the State alleges, which focus on a wide range of grocery products that can be purchased at a variety of retailers. This case does not involve a merger between suppliers of a single product, such as hydrogen peroxide or peanut butter. *See RAG-Stiftung*, 436 F. Supp. 3d 278. The State’s calculations therefore do no account in any way for the fact that, if Kroger were to raise prices on a can of soup, consumers could—and likely would—buy that can of soup online, at competing grocery retail stores, or at any nearby corner market. Indeed, because of the myriad products Kroger sells, Kroger faces competitive constraints from the wide range of retailers that sell baked goods, dry goods, fresh produce, and the like. The State’s narrow focus on so-called “traditional supermarkets” captures none of these constraints.

Rather, the State offers a binary approach where firms in its purported markets exert a full competitive restraint, while firms outside the markets exert no competitive restraint. But as Defendants will show, this all-or-nothing approach does not reflect consumer behavior or the

competition Kroger faces. To be sure, “no one would reasonably assert that buying all of one’s groceries from a fruit stand is a reasonable substitute for buying from a grocery store.” *FTC v. Sysco*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015). But given the wide range of competitors constraining Kroger and Albertsons today, a rote recitation of “market concentration” statistics does not accurately reflect competition.

*Second*, the barriers to entry in the grocery business are low. “Low barriers to entry enable a potential competitor to deter anticompetitive behavior by firms within the market simply by its ability to enter the market.” *Heinz*, 246 F.3d at 717 n.13. In Colorado, new stores that compete with Kroger are opening all the time. For example, Sprouts opened six new stores in Colorado from 2016 to 2022, as well as an additional store in 2023<sup>115</sup>; Costco continues to expand in Colorado, opening two new stores near Denver and Boulder in 2023<sup>116</sup>; and Target has expanded in Denver in particular, opening two new stores in 2021 and another in 2018.<sup>117</sup> Yet again, the State’s arguments are unsupported by any real-world facts.

Without evidentiary support, the State’s attempts to construct barriers to entry fail. *Contra* Mot. 47-49. The State claims that large retail spaces are a barrier, but online retailers—primarily Amazon—are increasingly expanding their foothold in the industry without needing brick-and-mortar store fronts. And companies like Amazon do not struggle with the “highly acute” logistical challenges the State identifies. Mot. 48-49. The State also points to the closure of unsuccessful

<sup>115</sup> Jaleesia Fobbs, *Sprouts Farmers Market Announces Grand Opening of New Colorado Springs Location*, KRDO (Aug. 2, 2023), <https://bit.ly/4chkE7R>.

<sup>116</sup> Lucas High, *Longmont Costco to Open May 4*, BIZWEST (Apr. 7, 2023), <https://bit.ly/3RIwkbA>; Desiree Mathurin, *The Long-Awaited Green Valley Ranch Costco Has an Official Opening Date*, Denverite (June 27, 2023) <https://bit.ly/3ztF26U>.

<sup>117</sup> Jennifer Tom, *Target Brings its Newest Store Concept to Downtown Denver this Sunday*, 303 Magazine (July 19, 2018), <https://bit.ly/4cC6Y6S>; Micah Smith, *What’s That?: Small-Format Target Store Opens at University Hills Plaza*, Denver 7 (Aug. 13, 2021), <https://bit.ly/45Edmsg>.

Albertsons stores after the Safeway/Albertsons merger as evidence that the industry has significant barriers to entry. *See Mot. 48.* Under the State’s theory, the fact that no grocery store opened in place of the closed Albertsons stores reflect barriers to entry. But the State overlooks the simpler explanation: that these grocery stores were closed because they were unsuccessful in the first place. That other grocers have not clamored to fill the shoes of failed Albertsons stores reflects that those locations were not profitable; not—as the State would have it—some broader barrier to entry.

The State also fails to account for entry and expansion by C&S. The State’s alarms about logistics and marketing capability, *see Mot. 48-49*, obviously do not apply to C&S. C&S is a multi-billion dollar company with an established distribution chain and the capital necessary to support robust marketing and promotions. Because C&S will immediately gain a foothold in the market via the divestiture agreement, its competitive presence will constrain Kroger’s pricing and other conduct from day one.

*Third*, the sheer number of products at issue in the grocery industry discourages collusion. “Whether a merger will make coordinated interaction more likely depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms.” *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (quotation marks omitted). Collusion in the grocery industry is implausible. While Kroger price-checks other grocery businesses, the prices and promotional offerings at competing stores are constantly in flux, preventing coordination on any large-scale basis.

The State’s only suggested evidence of “collusion” exposes the weakness of its claim. It relies on a single, out-of-context email in which an Albertsons employee stated an “inten[t]” to not hire striking employees from King Soopers (a Kroger banner) and to not solicit pharmacy customers during a strike. *See Mot. 44-45.* The State does not allege any reciprocal action by

Kroger as part of the supposed “agreement.” Moreover, even if the State’s cited evidence suggested coordination between Kroger and Albertsons regarding *labor relations*, such conduct would not constitute evidence of collusion in the market for consumer-facing *grocery* retail.

*Fourth*, the merger will create significant efficiencies that will be passed to consumers. Courts have long recognized that mergers can create efficiencies that benefit the economy. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (“One of the key benefits of a merger to the economy is its potential to generate efficiencies.”). The State cites *Sysco* for the proposition that the U.S. Supreme Court has not recognized efficiencies to support a merger, *see Mot.* 46, but *Sysco* itself acknowledged that efficiencies play a role, *see Sysco*, 113 F. Supp. 3d at 81-86 (analyzing alleged post-merger efficiencies). Indeed, the “trend among lower courts has ... been to recognize or at least assume that evidence of efficiencies may rebut the presumption that a merger’s effects will be anticompetitive.” *Deutsche Telekom*, 439 F. Supp. 3d at 207; *see also United States v. M.P.M., Inc.*, 397 F. Supp. 78, 93 (D. Colo. 1975) (“Service offered” by the new firm “was superior to that offered by either of the previously independent companies alone”).

The evidence will show that the merger will result in substantial efficiencies that are both verifiable and “merger specific,” meaning they “could not be achieved without the merger.” *H&R Block, Inc.*, 833 F. Supp. 2d at 89; *see supra* at 22-23, 30. Kroger’s internal target is to achieve [REDACTED] in efficiencies from the transaction, stemming from cost savings related to, among other things, sourcing, supply chain, manufacturing, and administrative functions, as well as from revenue growth related to increased private label sales penetration and greater sales in health and wellness. Generating these efficiencies will help Kroger invest in its customers and associates. As noted, Kroger plans to invest \$1.3 billion to improve customer experience and another \$1 billion to raise associate wages and benefits, plus at least \$500 billion in price investments in

Albertsons stores post-merger. These efficiencies are quantifiable by reliable methodologies and are unlikely to be realized absent the merger.

These merger-driven efficiencies will be passed to customers who will enjoy lower prices and an improved experience. In the years following Kroger’s acquisitions of Roundy’s and Harris Teeter, Kroger invested more than \$100 million and \$125 million respectively in lowering prices. The State wants this Court to deprive Coloradans of similar savings.

**D. The State Cannot Satisfy Its Ultimate Burden of Persuasion to Show That the Merger Will Substantially Lessen Competition in Colorado**

Stepping back, this is a case about competition. The ultimate question—on which the State bears the burden of persuasion—is whether allowing this merger to go forward will substantially lessen grocery competition in Colorado. For the reasons discussed above, it will not. Kroger and Albertsons are two players in a cutthroat industry that is only becoming more competitive. Kroger has developed a business model hyper-focused on lowering prices to compete with Walmart, and it intends to extend that strategy to the newly acquired Albertsons stores. Given the market realities of the industry, a merged Kroger entity will not—and could not—raise prices without losing significant market share. And in any event, the presence of C&S in the market will maintain (if not increase) the level of grocery competition that a merged Kroger entity would face. The bottom-line reality is apparent: This proposed merger is procompetitive, not anticompetitive.<sup>118</sup>

**II. THE STATE FAILS TO SATISFY THE “PUBLIC INTEREST” CRITERIA, WHICH INCLUDES THE INTERESTS OF THE ENTIRE UNITED STATES, NOT JUST COLORADO**

The State bears the burden to show that “the granting of a preliminary injunction will not disserve the public interest.” Mot. 19 (citation omitted); *see City & Cnty. of Denver v. Denver*

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<sup>118</sup> Defendants also intend to introduce evidence to establish a number of statutory, constitutional, and equitable defenses, and they expressly reserve the right to do so. This Opposition, however, focuses on the State’s failure to meet its burdens of production and persuasion.

*Firefighters Loc. No. 858, IAFF, AFL-CIO*, 320 P.3d 354, 356 n.4 (Colo. 2014) (“[T]he moving party [must] successfully demonstrate[] that” there would be “no disservice to the public interests if the injunction is granted.”) (quoting *Rathke*, 648 P.2d at 653-54). Nevertheless, the State does not even attempt to demonstrate how the preliminary injunction it seeks would advance any nationwide public interests. *See* Mot. 65. It offers just two conclusory paragraphs, devoid of any factual citations or meaningful analysis of what the public interest even *is*. *Id.* The State’s perfunctory showing is inadequate. *See, e.g., Bowman v. Sawyer*, No. 19-CV-1411, ECF 41 at 3 (D. Colo. Feb. 5, 2020) (denying preliminary injunction because plaintiff “entirely failed—indeed, [did] not even tr[y]—to carry his burden as to the fourth preliminary injunction factor, regarding public interest”).

When a requested injunction would have extraterritorial effects, those effects are crucial to the public-interest analysis. *See, e.g., Fraser v. ATF*, 689 F. Supp. 3d 203, 216 (E.D. Va. 2023) (it is “an aspect of the exercise of common sense that, of necessity,” “the scope of the injunction is to be considered as a matter of public interest”). And the issuance of an injunction under one state’s law “is clearly inappropriate” if the plaintiff fails to account for “the facts in a particular situation and the laws and public policy of the [other affected] state[s].” *Guardsmark, Inc. v. Borg-Warner Protective Servs.*, 1998 WL 959664, at \*12-13 (Tenn. Ct. App. Nov. 4, 1998); *see, e.g.*, Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. 43, 85 (2018) (“If New York aggressively pursues Microsoft, Washington may feel aggrieved. And if pro-environment states undermine the fortunes of big oil companies, the oil-producing states may share in the consequences.”).

In *In re Qwest Communications International, Inc. Securities Litigation*, 243 F. Supp. 2d 1179, 1187 (D. Colo. 2003), for example, the court denied plaintiff-shareholders’ request for a

preliminary injunction to freeze the defendant-company’s assets during the sale of its subsidiary, in part because the company not only “employ[ed] fifteen thousand people in Colorado alone,” but also “employ[ed] thousands of additional employees in each of the thirteen other states it serve[d].” Thus, the court explained, “a major disruption of [the company’s] operations d[id] present a significant threat to the multifaceted public interest.” *Id.*

The State has readily admitted that it seeks an injunction with vast extraterritorial effect, asking that this Court enjoin the “[c]onsummation” of the merger as a whole. Mot. 65. As the State has made clear: “The Attorney General does not dispute that he requests an injunction to block the transaction in full, nor that the transaction involves assets in numerous states.” Pl.’s Reply to Defs.’ Resp. to U.S. Statement of Interest at 3 (May 17, 2024). But despite that broad request, the State addresses only its *own* unique interests, ignoring those of the public in other states. In fact, the State does not even *allege* that the transaction will “disserv[e]” national interests. *See Denver Firefighters*, 320 P.3d at 356. Instead, the State’s case is limited to “local markets” in Colorado, Compl. ¶¶ 78, 97; *see id.* ¶ 108; alleges anticompetitive effects unique to Colorado, *id.* ¶¶ 132-33, 136, 141-42; and objects to the divestiture on the ground that it would not do enough in Colorado—irrespective of its extraterritorial benefits, *id.* ¶¶ 189, 191, 196-97. Colorado-specific interests are not a proxy for the interests of the United States as a whole.

Even if the State had attempted to show “that the granting of a preliminary injunction will not disserve the public interest” in these other states, *Rathke*, 648 P.2d at 654, it would come up empty. The State ignores the transaction’s substantial public benefits both within and outside Colorado. *See supra* at 22-23, 30. The evidence will show that the injunction the State requests would “present a significant *threat* to the multifaceted public interest” by depriving consumers and workers in other states of the benefits of a superior customer experience and increased efficiency.

*See Qwest Communications*, 243 F. Supp. 2d at 1187 (emphasis added). It will show that Kroger stores offer a superior customer experience, and the merger will allow Kroger to extend that experience to new customers, reinvigorating the Albertsons stores it acquires. *See supra* at 22-23, 30. Preventing the “[c]onsummation” of the merger, Mot. 65, would eliminate those benefits without so much as a thought for the vast majority of out-of-state beneficiaries.

### **III. THE STATE HAS NOT DEMONSTRATED THAT THE BALANCE OF EQUITIES FAVOR A PRELIMINARY INJUNCTION**

A preliminary injunction is an equitable remedy, and the State must establish “that the balance of equities favors the injunction.” *Bd. of Cnty. Comm’rs, Cnty. of Eagle, State of Colo v. Fixed Base Operators, Inc.*, 939 P.2d 464, 467 (Colo. App. 1997). Even where the plaintiff is a government entity attempting to enforce a statute, “[t]he default rule is that [the] plaintiff seeking a preliminary injunction must make a clear showing … that the balance of equities tips in [its] favor.” *Starbucks Corp. v. McKinnkey*, No. 23-367, slip op. at 5 (U.S. June 13, 2024) (quotation marks omitted). The State’s minimal discussion of the balance of the equities confirms that it cannot satisfy its burden. Mot. 64-66.

*First*, the State ignores the harm that an injunction would cause the parties. “[T]he grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.” *Mo. Portland Cement Co.*, 498 F.2d at 870.<sup>119</sup> By urging the Court to preliminarily enjoin the merger, therefore, the State is essentially asking the Court to decide the entire case on a partial record at a preliminary stage. Yet if the State succeeds in dragging out this litigation beyond

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<sup>119</sup> See also *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981) (Ginsburg, J.) (“A preliminary injunction may kill, rather than suspend, a proposed transaction.”); *FTC v. Foster*, 2007 WL 1793441, at \*51 (D.N.M. May 29, 2007) (“The need for caution in issuing a preliminary injunction is particularly important in the merger and acquisition context, because the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.” (quotation marks omitted)).

the outside date of October 9, 2024, the merger could die even if this Court ultimately concludes it is in the best interests of consumers and competition.

*Second*, the State’s Motion ignores the proceedings in the FTC Action and in Washington State. As courts recognize, issuing injunctions with extraterritorial effect “may create comity problems when similar, parallel lawsuits involving different plaintiffs are pending in other [jurisdictions’] courts.” *Florida v. HHS*, 19 F.4th 1271, 1285 (11th Cir. 2021). At the preliminary injunction stage, affording such extraterritorial relief “encourage[s] gamesmanship, motivating plaintiffs to seek out the friendliest forum and rush to litigate important legal questions in a preliminary posture,” thereby “disturb[ing] comity by hindering other courts from evaluating legal issues for themselves.” *Georgia v. President of the United States*, 46 F.4th 1283, 1305 (11th Cir. 2022).

That is precisely what the State attempts to do here, seeking five whacks at the transaction alongside other enforcers, in: (1) the FTC’s administrative challenge to the merger at the administrative hearing beginning July 31; (2) the FTC’s judicial challenge to the merger in federal court on August 26; (3) the Washington trial scheduled for September 16; (4) the preliminary injunction hearing in this case on August 12; and (5) the September 30 trial on the merits in this case. Defendants are prepared to defend the transaction in all of these proceedings. But given the lopsided procedural posture, this Court must hold the State to its burden of actually proving its equitable arguments with *evidence* rather than rhetoric.

#### **IV. THE STATUS QUO IS PRESERVED UNDER THE FTC ACTION**

The State also fails to show that the sweeping preliminary injunction it seeks “is necessary to preserve the status quo pending a trial on the merits.” Mot. 64; *see Gitlitz*, 171 P.3d at 1278 (citing *Rathke*, 648 P.2d at 653-54). Pursuant to the stipulated temporary restraining order in the FTC Action, the “status quo” is that Defendants will not close the transaction until at least five

business days after the court rules on Plaintiffs’ forthcoming request for injunctive relief. *Supra* at 25-26. The State cannot dispute that, in light of the order in the FTC Action, the State’s request for injunctive relief is not “necessary” to preserve anything in the immediate term. Mot. 65.<sup>120</sup>

Indeed, given the stipulated injunction in the FTC Action, the only scenario in which State’s requested preliminary injunction would take effect is if the federal court in the FTC Action were to *deny* the request for preliminary injunctive relief by the FTC and nine other attorneys general. Stated differently, the State’s requested injunction will be effective if *and only if* it directly conflicts with a ruling from the federal court in the FTC Action. But because the FTC Action includes express allegations about alleged harm in Colorado (and will apply a materially identical legal standard), an order denying injunctive relief in that case would be dispositive here.<sup>121</sup> In any event, there is no risk of the merger closing before the federal hearing concludes.

## **V. THE STATE HAS FAILED TO DEMONSTRATE IRREPARABLE HARM**

The State also fails to demonstrate irreparable harm. Despite its burden, the State offers only two conclusory paragraphs about irreparable harm, insisting that “sharing of information post-merger alone creates potential harm to competition,” and the merger “will be almost impossible and highly disruptive to unwind.” Mot. 64. But both of those arguments assume the State is correct on the merits, which—for the reasons discussed, *see supra* at 37-58—it has not shown.

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<sup>120</sup> The State’s framing of the “status quo” also misses the mark. As one court recently noted, while “[p]reservation of the ‘status quo’ is regularly argued as a reason to enter injunctive relief” against a merger, “it is also true that, absent a legal prohibition, the parties would currently be free to merge or otherwise pursue their private business interests.” *FTC v. Cnty. Health Sys., Inc.*, 2024 WL 2854690, at \*4 n.6 (W.D.N.C. June 5, 2024). The court therefore concluded that “a call to maintain the ‘status quo’ under these circumstances is, at best, of uncertain consequence,” and the better approach is to assess the traditional injunctive factors, including the balance of the equities and the effect of an injunction on the public interest. *Id.*

<sup>121</sup> Because the State is in privity with the FTC, it would be bound by any decision in the FTC Action. But at minimum, the decision in the FTC Action addressing Colorado-specific issues would be highly persuasive in this case.

Although the State initially concedes that it must satisfy all six equitable requirements for a preliminary injunction, Mot. 19-20, it later argues that it “is not required to plead or prove immediate or irreparable injury when a statute concerning the public interest is implicated,” Mot. 64 (citing *Bd. of Cnty. Comm’rs of Cnty. of Logan v. Vandemoer*, 205 P.3d 423, 431 (Colo. App. 2008)). The State is wrong.

This case is not the type of suit “in behalf of the public” where the government is sometimes exempt from showing irreparable harm. *Lloyd A. Fry Roofing Co. v. State Dep’t of Health Air Pollution Variance Bd.*, 553 P.2d 800, 808 (Colo. 1976). Because this case involves a nationwide merger and the State seeks extraterritorial relief, the “public” is the entire nation, not Colorado. But the *federal* government “enforces the federal antitrust laws on behalf of the American people,” “according to some uniform plan, operative throughout the entire country.” Statement of Interest of the United States at 13, *Deutsche Telekom*, 439 F. Supp. 3d 179, ECF No. 348 (S.D.N.Y. Dec. 20, 2019) (citing *Minn. v. N. Sec. Co.*, 194 U.S. 48, 70-71 (1904)). The challenge “in behalf of the public” is the FTC Action, not the State’s go-it-alone lawsuit.

## **VI. THE STATE’S REQUESTED REMEDY IS DISPROPORTIONATE TO ITS ALLEGED HARM AND IMPERMISSIBLE AS A MATTER OF LAW**

Injunctive relief must be tailored to the precise harm shown. Indeed, as this Court recognized when it denied Defendants’ Motion to Dismiss: “Whether an injunction is proper, and the proper tailoring of such an injunction, are questions that … must be determined at a later stage.” Order Denying Defendants’ Mot. to Dismiss at 13 (June 26, 2024). The “later stage” now arises with the State’s Motion, which offers no tailoring of any kind to limit its requested relief to the alleged harm in the State of Colorado. In fact, while the Court’s Order did not “read Plaintiffs’ Complaint as an all-or-nothing request seeking an injunction stopping the merger,” *id.* at 8, the State’s Motion seeks precisely that all-or-nothing relief, *see* Mot. 65.

The law is clear that, “[i]f a less drastic remedy” than the State’s requested injunction would be “sufficient to redress” the alleged “injury, no recourse to the additional and extraordinary relief of [such] an injunction [is] warranted.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). A court may enjoin “only the specific conduct that it determines was improper.” *State ex rel. Meyer v. Ranum High Sch.*, 895 P.2d 1144, 1145 (Colo. App. 1995). The State asserts harm in Colorado only, yet it asks for an injunction affecting every State in the nation. It therefore has demonstrated the tailoring that the law requires.

By devoting more than 75 paragraphs of its Complaint to the adequacy of Defendants’ initial proposed divestiture to C&S, the State has acknowledged that *some* divestiture would address its alleged harms. *See, e.g.*, Compl. ¶¶ 172-246. The State objects to the proposed divestiture because, among other things, it “does not include enough stores in Colorado,” *id.* ¶ 189, “[t]he number of stores also fails to address all local markets,” *id.* ¶ 190, it fails to include sufficient distribution centers, *id.* ¶ 219, it does not include Albertsons’ dairy facility in Denver, *id.* ¶¶ 55, 179, and it requires re-banning of Safeway stores, *id.* ¶ 177. The State’s Motion is the same, spending fifteen pages on the purported inadequacy of a hypothetical divestiture that is not before the Court. *See Mot.* 49-65. The State does not seek a different or more tailored divestiture that it believes would address its alleged concerns. Nor does it suggest any limitation on its requested relief. The State’s insistence on impermissible and disproportionate remedy means it cannot obtain the extraterritorial preliminary injunction that it seeks here.

## CONCLUSION

For these reasons and others to be expounded at the August 12 hearing, if necessary, the Court should deny the State’s Motion for a Preliminary Injunction.

DATED this 26th day of June, 2024.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing document has been served on all counsel who have entered an appearance in this matter through Colorado Courts E-Filing, on June 26, 2024, including the following:

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Stinnie, et al. v. Holcomb, 11/15/18

1                   UNITED STATES DISTRICT COURT  
2                   FOR THE WESTERN DISTRICT OF VIRGINIA  
3                   CHARLOTTESVILLE DIVISION

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4 DAMIAN STINNIE, individually  
5 and on behalf of all others  
6 similarly situated, et al.,

CIVIL ACTION 3:16-CV-00044

NOVEMBER 15, 2018, 1:32 P.M.

CHARLOTTESVILLE, VA

PRELIMINARY INJUNCTION HEARING  
VOLUME I OF I

7 vs.

8 RICHARD D. HOLCOMB, in his  
9 official capacity as the  
Commissioner of the Virginia  
10 Department of Motor Vehicles,

Before:

HONORABLE NORMAN K. MOON  
UNITED STATES DISTRICT JUDGE  
WESTERN DISTRICT OF VIRGINIA

11 Defendant.

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1 (Proceedings commenced, 1:32 p.m.)

2 THE COURT: Good afternoon.

3 MR. BLANK: Good afternoon, Judge.

4 MS. O'SHEA: Good afternoon, Your Honor.

5 THE COURT: Call the case, please.

6 THE CLERK: Yes, Your Honor. This is Civil Action  
7 Number 3:16-CV-44, *Damian Stinnie and others versus Richard*  
8 *B. Holcomb.*

9 THE COURT: Plaintiffs ready?

10 MS. CIOLFI: Yes, Your Honor.

11 THE COURT: Defendants ready?

12 MS. O'SHEA: Yes, sir.

13 THE COURT: All right. You may proceed.

14 MS. CIOLFI: Good afternoon, Your Honor. Angela  
15 Ciolfi for the plaintiffs. With me here is Jonathan Blank,  
16 Leslie Kendrick, Alyssa Pazandak, and Ben Abel for the  
17 plaintiffs. We are here on the plaintiffs' motion for a  
18 preliminary injunction.

19 Your Honor, we welcome the opportunity to be back in  
20 front of this Court. We have carefully read and re-read the  
21 Court's opinion on the motion to dismiss and Judge Gregory's  
22 opinion on the appeal, and we have made every effort to  
23 satisfy the Court's concerns. And that's critically  
24 important because since we filed the complaint in 2016, the  
25 Commonwealth has suspended hundreds of thousands of licenses

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1 for failure to pay and hundreds of thousands of people have  
2 been convicted and/or gone to jail for driving while  
3 suspended where the underlying reason for the suspension was  
4 solely failure to pay.

5 So what has changed since we were last before you?

6 Two federal courts in Tennessee and Michigan have  
7 issued statewide injunctions against the future enforcement  
8 of similar statutes, and in ruling on a motion to stay the  
9 Sixth Circuit said the state was unlikely to succeed on the  
10 merits of this appeal, challenging the District Court's  
11 ruling on procedural due process.

12 Judge Gregory, who is the only judge from the Fourth  
13 Circuit who examined the jurisdictional issues on this  
14 appeal, said unequivocally that this court has jurisdiction,  
15 and we have amended our complaint in several significant  
16 ways, including alleging clearly and unequivocally that,  
17 despite what the statute says, the Commissioner issues the  
18 automatic suspension without any order from the Court.

19 We've alleged clearly and unequivocally that the  
20 electronic transmission that goes to the DMV from the courts  
21 is just a notification of an unpaid account, no more and no  
22 less. And we are ready to present testimony today to  
23 establish the truth of those allegations.

24 We've also added plaintiffs whose licenses were  
25 suspended well after any appeal deadlines had run and they

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1 defaulted on payment plans.

2 And finally, we clarified that the relief we are  
3 seeking is an order declaring the statute unconstitutional  
4 and enjoining the DMV officer from enforcing it.

5 This statewide enforcement scheme is devastating to  
6 individuals and families in every jurisdiction in the  
7 Commonwealth. Today we plan to present evidence  
8 demonstrating that a narrowly crafted preliminary injunction  
9 should issue in order to prevent further devastation, but  
10 first we would like to address some of the procedural issues  
11 raised by the defendant.

12 First, this Court has and cannot abrogate  
13 jurisdiction based on *Rooker-Feldman*, because no state court  
14 has heard or decided plaintiffs' constitutional claims and  
15 because any role the state courts play in plaintiffs'  
16 suspension is purely ministerial. *Rooker-Feldman* only bars  
17 federal courts from reviewing decisions where the state court  
18 actually weighs the issues and renders a decision.

19 The plaintiffs also have standing because the  
20 Commissioner is at least partly responsible for their  
21 injuries, which is all we need to show for causation and  
22 because an order to the Commissioner would address most, if  
23 not all, of the plaintiffs' injuries.

24 As Judge Gregory pointed out, if the Court issues an  
25 injunction, it would be because the suspensions were

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1 effectuated pursuant to an unconstitutional process, and so  
2 the plaintiffs' licenses would no longer be suspended even in  
3 a legal, technical sort of sense, but also because an order  
4 waiving the reinstatement fee alone is enough to confer  
5 standing to these plaintiffs.

6 Finally, the Commissioner is not entitled to  
7 Eleventh Amendment immunity because the Commissioner has  
8 express enforcement responsibilities under 46.2-395 and is,  
9 in fact, the only state official responsible for  
10 reinstatement of licenses. No more is required to apply the  
11 *Ex Parte Young* exception.

12 Your Honor, fundamentally, the Commonwealth's  
13 arguments on jurisdiction boil down to three words: It  
14 wasn't me. They point the finger at the courts. They would  
15 like this court to focus on what I will call time one, which  
16 is the time of conviction. They want you to do that because  
17 time one is messy, dealing with payment plans and community  
18 service and what the judges do versus what the clerks do.  
19 But we simply didn't challenge what happens at time one. We  
20 challenged what happens at time two, which is the time of  
21 default; and at time two, this case is very simple, because  
22 there is no due process.

23 At the time of default, there is no notice of  
24 alleged default. There is no ability-to-pay hearing. There  
25 is no determination of willfulness, no process at all. There

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1 is just an electronic transmission from the court computer to  
2 the DMV computer and, zap, there goes your license, and in  
3 many cases, for many of our plaintiffs, their livelihood.  
4 Nothing in the Commonwealth's briefs or Ms. Ford's  
5 declaration attached thereto contradicts that.

6 Perhaps the Commonwealth would like us to sue  
7 hundreds of court clerks and hundreds of judges, but putting  
8 aside the waste of judicial resources that would entail, if  
9 we sue the courts they are likely to say exactly the same  
10 thing that the DMV Commissioner is now saying: We are immune  
11 and, hey, it wasn't us, it was the DMV.

12 And we know that's what they'll say because that's  
13 what the clerk of the Circuit Court for the City of  
14 Charlottesville says: It's the DMV. And that's what the  
15 chief judge of the Albemarle General District Court says: It  
16 is the DMV, in his policy regarding payment plans, which was  
17 attached to our reply brief at footnote 3.

18 We never said the courts had no role to play. Sure  
19 they do. They track payments on court debt and input  
20 deadlines into the computer system, but that role is purely  
21 ministerial, and nothing this court could do would upset any  
22 judicial decision-making.

23 There is no rule that says that we have to sue  
24 everybody responsible for the plaintiffs' suspensions, but we  
25 chose to sue the DMV Commissioner. And why did we do that?

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1 Because he is the single statewide actor who represents the  
2 Commonwealth's interests in this uniform statewide  
3 enforcement scheme. Because we aren't contesting what the  
4 courts do with respect to payment plans or community service,  
5 however flawed they may be, and because he is the proximate  
6 cause of the plaintiffs' injuries. He is the one who  
7 maintains the database that the police check when they decide  
8 whether to pull someone over for driving while suspended. He  
9 produces the driving transcripts that prosecutors and courts  
10 rely on for driving while suspended convictions, and he  
11 imposes the \$145 reinstatement fee. An order against the  
12 Commissioner would prevent all of those injuries, and more.

13 Your Honor, you need look no further than Ms. Ford's  
14 declaration submitted by the defendant at paragraph 5 to see  
15 that the DMV Commissioner has a special relationship to the  
16 statute that we're challenging. She says, "I have specific  
17 knowledge of the process mandated by Virginia Code 46.2-395  
18 and DMV's responsibilities thereunder. In addition, I have  
19 been instrumental in working with the Office of the Executive  
20 Secretary of the Supreme Court, OES, to implement those  
21 policies and procedures." She then goes on to describe all  
22 of the activities that DMV engages in to enforce the statute.

23 So this is the point: The Commonwealth enacted a  
24 statute that mandates license suspension for unpaid court  
25 debt. The Commonwealth tasked the OES and the DMV to set up

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1 a system to enforce that statute as automatically and as  
2 administratively efficiently as possible.

3 All that the Ford declaration proves is that the  
4 enforcement scheme works exactly as it was intended to work:  
5 Automatically, mandatorily, and with utter disregard for  
6 whether people are unwilling or simply unable to pay. It is  
7 the Commonwealth that chose to set it up that way, and  
8 although the evidence we present today will demonstrate that  
9 the DMV suspends the licenses without a court order,  
10 ultimately it doesn't matter whether the court initiates the  
11 suspension or not, because the Commonwealth cannot deny that  
12 the Commissioner is absolutely indispensable to the  
13 enforcement scheme. It simply doesn't work without him. And  
14 it's clear that the Commissioner is a proper defendant so  
15 long as an order against him would provide meaningful relief  
16 to the plaintiffs.

17 With the Court's indulgence, we are prepared to put  
18 on evidence today to demonstrate we're likely to succeed on  
19 the merits, that the plaintiffs will continue to suffer  
20 irreparable harm in the absence of an injunction, and that the  
21 balance of the equities are in the plaintiffs' favor and an  
22 injunction is in the public interest. Such an order would  
23 bring this court into alignment with the other two federal  
24 courts that have looked at this issue, found that the federal  
25 courts did have jurisdiction and that the plaintiffs had

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1 established likelihood of success on the merits on at least  
2 one of their claims, which is all we need for preliminary  
3 injunctive relief.

4 You'll hear from Ms. Adrainne Johnson, mother of  
5 three, who recently lost her job because she could not get to  
6 and from the new location she was assigned to across town  
7 without a license; Llezelle Dugger, the clerk of the court  
8 for the City of Charlottesville Circuit Court, and Julie  
9 Moats, a former general district court clerk, who will both  
10 testify that all they do on the court side is enter a payment  
11 due date and that licenses are suspended not by any clerk or  
12 judge, but by the DMV after the court computer talks to the  
13 DMV computer, transmitting a record of nonpayment; Dr. Diana  
14 Pearce, who is an expert in poverty and economic inequality,  
15 will testify that each of the named plaintiffs, and others  
16 like them, cannot afford to meet their basic needs while also  
17 making payments to the court; and Dr. Steven Peterson, an  
18 economist who will testify that license suspension  
19 disproportionately impacts Virginia's poor, limits their ability to  
20 work, and also makes it more difficult to pay their costs and  
21 fines to the court.

22 Under Rule 43, we are also prepared to offer  
23 declarations from Jon Carnegie and Robert Fuentes, experts on  
24 the relationship between reliance on driving and access to  
25 economic opportunities.

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1           At the close of the evidence we'll ask this Court to  
2 enter a preliminary injunction enjoining the Commissioner  
3 from enforcing Section 46.2-395 against the plaintiffs and  
4 the future suspended class unless and until the Commissioner,  
5 or another state actor, determines through a hearing and  
6 adequate notice thereof that their failure to pay was  
7 willful, and ordering the Commissioner to remove any current  
8 suspensions imposed under the statute against the individual  
9 named plaintiffs without charging a reinstatement fee.

10           The relief we are asking for here is modest. The  
11 Commonwealth simply can't claim it is administratively  
12 burdensome to remove three suspensions from their database  
13 and not to process future suspensions. Their burden is  
14 insignificant, especially compared to the burden on the  
15 plaintiffs.

16           As Judge Trauger in the Middle District of Tennessee  
17 observed, "Every day without adequate transportation is a day  
18 in which a person is likely to be pulled more deeply into  
19 poverty; to grow more isolated from family and community; and  
20 to fail to receive needed medical care or perform necessary  
21 tasks. A person cannot merely put his participation in life  
22 on hold for months or years at a time and hope to return no  
23 worse for wear."

24           After the Commonwealth responds, we'd like to be  
25 able to put on evidence in support of our motion.

Johnson - Direct

1 Thank you, Your Honor.

2 THE COURT: All right.

3 MS. O'SHEA: Good afternoon, Your Honor. Margaret  
4 O'Shea on behalf of Commissioner Holcomb.

5 In light of the fact that the plaintiffs are  
6 intending to present evidence to the Court for consideration  
7 of the preliminary injunction, the Commissioner will reserve  
8 our substantive arguments for closing in the interest of  
9 moving things along this afternoon.

10 THE COURT: All right.

11 MS. O'SHEA: Thank you.

12 THE COURT: Maybe you can agree to some of the --  
13 what they're putting on evidence for.

14 MS. O'SHEA: Yes, Your Honor, and we have.  
15 Considering that this is a motion for preliminary injunction,  
16 we've stipulated that the documentary evidence can be entered  
17 to the Court without need to go through hearsay exceptions  
18 and so on and so forth. Yes, sir.

19 THE COURT: All right. Call your first witness,  
20 then.

21 MS. CIOLFI: Plaintiffs call Ms. Adrainne Johnson.

22 ADRAINNE JOHNSON, CALLED BY PLAINTIFFS, SWORN

23 DIRECT EXAMINATION

24 BY MS. CIOLFI:

25 Q Good afternoon, Ms. Johnson.

Johnson - Direct

1 A Good afternoon.

2 Q Please state your name.

3 A Adrainne Johnson.

4 Q And how old are you?

5 A 34.

6 Q And where do you live?

7 A Charlottesville, Virginia.

8 Q How long have you lived here?

9 A All my life.

10 Q Do you have any children?

11 A Yes.

12 Q How many?

13 A Three.

14 Q And what are their ages?

15 A 15, 14, and 12.

16 Q Can you tell us what the status of your driver's license  
17 is?

18 A Suspended.

19 Q And how long has it been suspended?

20 A Off and on since 2016.

21 Q Why is it suspended?

22 A For court fines and costs.

23 Q And for nonpayment of court costs and fines?

24 A Yes.

25 Q And why didn't you pay your court costs and fines?

Johnson - Direct

1 A I went on -- I tried to pay it. I was on a payment  
2 arrangement agreement, and my expenses as far as with my  
3 income didn't work out. It left me with nothing to have to  
4 pay on it.

5 Q What is your income now?

6 A My income now is only \$9 an hour.

7 Q And about how many hours do you work a week?

8 A 37.

9 Q Do you have any money left over at the end of the week?

10 A No.

11 Q Do you have any savings?

12 A No.

13 Q Do you have any debts?

14 A Yes.

15 Q And can you tell us about those?

16 A To a previous landlord.

17 Q And how much?

18 A It's over a thousand dollars.

19 Q And do you know how much you owe to the courts?

20 A A little over a thousand.

21 Q Can you afford to pay that now?

22 A No.

23 Q Did you have a hearing at the time that your license was  
24 suspended?

25 A No.

Johnson - Direct

1 Q And has your license been suspended more than once for  
2 failure to pay court costs and fines?

3 A Yes.

4 Q And did you have a hearing at any time?

5 A Yes.

6 Q I'm sorry. Did you have a hearing at any time when it  
7 was suspended?

8 A No.

9 Q Has anyone from the courts or the DMV ever asked you what  
10 you could afford to pay?

11 A No.

12 Q What is it like not to have a license?

13 A It's very stressful. It's very inconvenient to me and to  
14 my children. I have my daughter who has medical issues, and  
15 she has to see a counselor, and it's not on the bus line.  
16 And my son, he plays sports, and I'm unable to take him or to  
17 go to any of his games. And he doesn't understand. It's  
18 very -- it hurts him very bad. It's very emotional to him  
19 and myself.

20 Q How has not having a license affected your employment  
21 options?

22 A With me not being able to have my license, I have lost a  
23 job. I have also been to the point where I went through  
24 interviews and was offered a job, but without my license, I  
25 could not accept the job, because my license was suspended.

Johnson - Direct

1 Q How far did you get in the process when you were not  
2 getting the job because of your license?

3 A All the way to the end, to the point where, if my license  
4 wasn't suspended, I would have had the job.

5 Q And you mentioned that you lost a job because of not  
6 having a license. Can you tell us more about that?

7 A Yes. I was working for a company and our hours got cut  
8 back, and I went to my manager complaining about it. And  
9 they reached out to another store, where the other store had  
10 opportunity for me to get some hours there, but it was not in  
11 the bus route. It was all the way past out Ivy Road, and I  
12 explained to them that I did not have the transportation to  
13 get there. And when I didn't go, they gave me a no call, no  
14 show, and I got terminated.

15 Q And when was that?

16 A Beginning of October.

17 Q Of this year?

18 A Yes, sir -- ma'am.

19 Q And were you unemployed then, after that happened?

20 A Yes.

21 Q And how long were you unemployed?

22 A I was unemployed for two to three weeks.

23 Q And were there any consequences to being unemployed?

24 A Yes. I fell behind in my rent. And then I received a  
25 30-day eviction notice.

Johnson - Direct

1 Q Are you employed now?

2 A Yes.

3 Q And how do you get to work?

4 A I have two job locations. The store that I work for has  
5 two locations; one on Cherry Avenue, one on Pantops. If I  
6 work the Cherry Avenue store, I will walk. If I work  
7 Pantops, I have to catch the bus, and I will have to leave  
8 home a whole hour to hour and a half before my scheduled  
9 shift.

10 Q And when you walk, about how long does it take?

11 A Like, 20 to 25 minutes.

12 Q Do you have any opportunities for advancement at your  
13 current job?

14 A Yes, I do.

15 Q Can you tell us about that?

16 A My manager has spoke with me about being the manager for  
17 the Pantops store. And with that position I would have to --  
18 I am required to do bank deposits. And I can't do bank  
19 deposits without having a license, because I can't drive.  
20 And if I don't -- can't do that, I won't be able to take the  
21 position.

22 Q And would that position pay more?

23 A Yes, it will.

24 Q How do you buy food?

25 A I buy food every two weeks, and I try to get enough to

Johnson - Direct

1 last for two weeks; but by the end of the second week, we're  
2 running out.

3 I have to sit there and get -- try to find a ride. If I  
4 don't have a ride, because I don't have the income to pay  
5 someone to take me, I don't -- I have to walk to the grocery  
6 store. I have to walk to the grocery store, and I'm only  
7 limited to getting a little bit of stuff because of not being  
8 able to carry all the bags and stuff.

9 Q Can you tell us about your current housing situation?

10 A My current housing situation is overcrowded. It's a  
11 shared housing. It's overcrowded.

12 Q And would your housing situation be any different if you  
13 had a driver's license?

14 A Yes, it would be.

15 Q How is that?

16 A Because with my driver's license, I will be able to have  
17 a better paying job, where I can afford to be somewhere with  
18 me and my kids where they have their own privacy and we  
19 wouldn't have to be in a shared housing.

20 Q Have you ever driven while your license was suspended?

21 A Yes, I have.

22 Q And what happened?

23 A I got pulled over. And when I got pulled over, the  
24 officer asked me for my driver's license; I gave it to him.  
25 He went back to his vehicle, he came back, and he said, Well,

Johnson - Direct

1 Ms. Johnson, your license is suspended. Are you aware of  
2 that?

3 And at the time, I was not aware. And then it was a  
4 second time. But the first time, he gave me a paper where I  
5 had to surrender my driver's license to him, and he gave me a  
6 paper stating that I surrendered my driver's license, and  
7 then he also told me that my license was suspended.

8 Q And you said there was a second time?

9 A Yes.

10 Q And so why did you -- and were you charged with driving  
11 while suspended the second time?

12 A Yes.

13 Q And convicted?

14 A Yes.

15 Q And as a result of that, what happened?

16 A More court costs and court fines.

17 Q And why did you keep driving when you knew your license  
18 was suspended?

19 A Because I needed to get to work so that I could be able  
20 to provide for my kids and myself. And where I was living at  
21 at the time did not have no public transportation.

22 Q And do you drive now?

23 A No.

24 Q Why not?

25 A Because I don't want to go to jail and I don't want to

Johnson - Cross

1 leave my kids.

2 Q How would your life be different if you had a license?

3 A If I had a license, I would be -- my life would be  
4 different because I would be able to have a better paying job  
5 so that I could be more able to provide for my kids and  
6 myself better. And I also would be able to pay my court  
7 costs and my court fines because of a better paying job  
8 instead of a low-paying job.

9 MS. CIOLFI: Thank you, Ms. Johnson.

10 CROSS-EXAMINATION

11 BY MS. O'SHEA:

12 Q Good afternoon, Ms. Johnson.

13 A Good afternoon.

14 Q My name is Margaret O'Shea. I'm going to ask you a few  
15 questions about the testimony that you have just given.

16 You testified that you live here in Charlottesville, and  
17 that you're able to walk to one of your jobs and take a bus  
18 to a different location; is that correct?

19 A Yes.

20 Q And you said that you work for a store?

21 A Yes.

22 Q What type of store is that?

23 A It's Boost Mobile. It's Tower Associates.

24 Q Okay. So, like, an electronics-type store, then?

25 A Uh-huh.

Johnson - Cross

1 Q Okay.

2 A Cellular phones.

3 Q Okay. What other sort of job opportunities would you be  
4 interested in pursuing apart from the job that you currently  
5 have?

6 A A driving job.

7 Q Like what?

8 A Driving, like, a shuttle bus for a hotel. Or even I  
9 wanted to drive the bus; not the school bus, but the city  
10 bus.

11 Q What are the qualifications for being able to drive a  
12 city bus?

13 A You have to have a license and then you have to get your  
14 CDLs.

15 Q Well, are you able to obtain those things with a prior  
16 felony conviction?

17 A Yes.

18 Q Are you sure about that?

19 A Yes.

20 Q Apart from driving a city bus or a shuttle bus, what  
21 other sorts of jobs would you be interested in pursuing?

22 A Umm, I don't know.

23 Q How much money would you get paid if you drove a city  
24 bus?

25 A I don't remember off the top of my head.

Johnson - Cross

1 Q How much money would you get paid for driving a shuttle  
2 bus for a hotel?

3 A With my interviews, it was \$12 an hour.

4 Q How many hours a week?

5 A 40.

6 Q Now, you agree that there's a bus system here in  
7 Charlottesville, correct?

8 A Yes.

9 Q There are taxis, too, right?

10 A Yes.

11 Q There are bike paths, correct?

12 A Uh-huh.

13 Q Would you agree that there's a large student population  
14 here in Charlottesville that's able to get around without a  
15 car on campus?

16 A I mean, I can't speak on that one.

17 Q I'm going to ask you a few questions now about your  
18 driving history and some things that have come up in the past  
19 here in Virginia. All right?

20 A Uh-huh.

21 Q So it appears that back in 2008, going back to 2008, you  
22 got some traffic infractions here in Charlottesville in  
23 general district court.

24 Do you recall that?

25 A Uh-huh.

Johnson - Cross

1 Q And you were assessed fines and costs as a result of  
2 those traffic infractions, correct?

3 A Yes.

4 Q And you were able to pay those, right?

5 A Yes.

6 Q And you did, in fact, pay those, right?

7 A Yes.

8 Q Okay. And then the next time that you ended up with a  
9 traffic infraction was in Albemarle General District Court,  
10 and that was in 2011.

11 Do you recall that?

12 A Yes.

13 Q And you were assessed fines and costs as a result those  
14 traffic infractions, too, right?

15 A Yes.

16 Q And you paid those, right?

17 A Yes.

18 Q And then the next time that you had some traffic  
19 infractions, there was one here in Charlottesville in 2012,  
20 correct?

21 Do you recall that?

22 A (Shaking head.)

23 Q For failing to obey a stop sign?

24 A Yes.

25 Q Okay. And again you were assessed fines and costs as a

Johnson - Cross

1 result of that traffic infraction, right?

2 A Yes.

3 Q And you paid those, right?

4 A Yes.

5 Q The next time that you were brought before the court was  
6 not for a traffic infraction; that was for your prior felony  
7 conviction in Brunswick Circuit Court, correct?

8 A Yes.

9 Q And that was the felony for delivering drugs to a  
10 prisoner?

11 MS. CIOLFI: Objection, Your Honor, the relevance of  
12 the type of felony.

13 THE COURT: What is it?

14 MS. O'SHEA: It goes to employability. It was a  
15 felony for delivering drugs to a prisoner.

16 MS. CIOLFI: Your Honor, there's --

17 THE COURT: I don't think it's particularly  
18 relevant. I mean, it may keep her from getting certain jobs,  
19 but not all jobs.

20 MS. O'SHEA: Correct.

21 THE COURT: All right. It just makes it harder for  
22 her to get a job.

23 BY MS. O'SHEA:

24 Q All right. And as a result of that conviction in 2013 in  
25 Brunswick County, you were assessed court costs in the amount

Johnson - Cross

1 of \$865?

2 A Yes.

3 Q Did you have any other costs associated with that  
4 conviction other than that \$865?

5 A No.

6 Q Okay. And what did you do when you got that felony  
7 conviction and you were assessed the \$865 in terms of paying  
8 that off? For example, did you get a payment plan or  
9 installment plan with the Brunswick Circuit Court?

10 A Yes.

11 Q And you were, in fact, able to make payments for about  
12 three years on that particular -- on those outstanding court  
13 costs, correct?

14 A Yes.

15 Q Do you know how much of that \$865 you paid off during the  
16 three years that you were on the payment plan?

17 A No.

18 Q Do you know how much of that \$865 is left today?

19 A I think it's 700-and-something.

20 Q At any time before or after you defaulted on the payment  
21 plan that you got, did you go to the Brunswick Circuit Court  
22 and file anything with the court or ask them to change that  
23 payment plan?

24 A No. What happened was I spoke with the clerk.

25 Q So did you physically go to the clerk, or did you call

Johnson - Cross

1 them up on the phone?

2 A Phone.

3 Q And so when you talked to the clerk, what did you tell  
4 the clerk?

5 A I explained to her about my situation and my income.

6 Q Okay.

7 A And she advised me that my payments, they couldn't go no  
8 lower than what I was already on at the time.

9 Q How much were you paying?

10 A I was doing \$100 a month.

11 Q So you paid \$100 a month for three years and it only took  
12 off --

13 A No.

14 Q I'm confused. Help me with the math.

15 A That was my payment arrangement, was \$100 per month.

16 Q For the entire three years that you were on the payment  
17 plan?

18 A No.

19 Q Okay. What was it when you started on the payment plan?

20 A \$100.

21 Q Okay.

22 A And then I lost my employment, so the payment plan had  
23 stopped.

24 Q The payment plan stopped, meaning the court stopped  
25 offering the payment plan --

Johnson - Cross

1 A No.

2 Q -- or meaning that you stopped making your payments under  
3 the payment plan?

4 A Yes, because I didn't have no income.

5 Q I guess my question is: At what point in time did that  
6 happen? Was that 2016, or was that before 2016?

7 A It was, like, 2016.

8 Q Okay. So my question is: Between 2013 and 2016, were  
9 you continuously making your payments during that time  
10 period?

11 A Yes, I was making payments, but it wasn't for the \$100.

12 Q Okay. So how much were those payments during that  
13 three-year period of time?

14 A \$75. And then I got knocked off of the payment plan  
15 because of not being able to pay because I lost employment.

16 Q No, I understand. I just -- I'm having some problems  
17 with the math here. Because you were convicted in 2013, and  
18 you're saying you got knocked off in 2016, but you were  
19 paying -- making payments, monthly payments, during those  
20 three years. I'm just trying to figure out how much those  
21 payments added up to.

22 Okay. So at one point it was \$75 a month, and at a  
23 different time it was \$100 a month? Yes?

24 A Yes.

25 Q So after you lost your job, you said that you called the

Johnson - Cross

1 clerk's office, correct?

2 A Yes.

3 Q All right. And what, if anything, did the clerk's office  
4 from Brunswick County advise you?

5 A What she had told me was that she would have to get back  
6 with me to let me know if I could restart a payment plan  
7 because of the payment plan, being that I didn't complete it.  
8 And so she never -- I never had heard nothing back from her,  
9 so I reached back out to her. And when I reached back out to  
10 her, she said that they can restart my payment plan, but I  
11 would have to pay a certain amount down and this is the  
12 amount that I would have to pay each month.

13 Q And have you, in fact, restarted a payment plan in  
14 Brunswick County?

15 A No, I haven't.

16 Q Have you gone to the Brunswick County courts and asked  
17 them to give you a restricted driver's license?

18 A No, because I wasn't eligible at the time because my  
19 license -- I didn't have a job when I spoke with her.

20 Q You have a job now, though, right?

21 A Yes, I do.

22 Q And when did you get this job?

23 A On Halloween. I started on Halloween.

24 Q October of this year?

25 A Yes.

Johnson - Cross

1 Q Is this the first time that you've been employed in the  
2 past 12 months?

3 A No.

4 Q What job did you hold before this?

5 A It was at a gas station.

6 Q And when did you hold that job?

7 A For, like, six months. I started there approximately  
8 August.

9 Q 2018?

10 A Yes.

11 Q And how long were you at the gas station for?

12 A Approximately six months.

13 Q Well, August -- do you mean August 2017?

14 A No. It was May -- sorry, sorry. April. It was April.  
15 April until the beginning of October.

16 Q So from April of 2018 until October 2018, you were  
17 employed at a gas station?

18 A Yes.

19 Q And then in October of 2018, after Halloween, or on  
20 Halloween, right about Halloween, is when you got the job  
21 that you have now?

22 A Uh-huh. Yes.

23 Q Make sure you say yes or no for the court reporter.

24 Prior to working at the gas station in April of 2018,  
25 what was the last job you had before that?

Johnson - Cross

1 A I used to do home health.

2 Q And when was the last time you had a job in home health?

3 A 2016.

4 Q How long did you -- did you stop in 2016 or start in  
5 2016?

6 A I stopped in 2016.

7 Q So between 2016 and April of 2018, you were unemployed?

8 A Yes.

9 Q What was your source of income during those two years?

10 A I had no income.

11 Q What did you do for money?

12 A I had tried to file unemployment, but I couldn't get  
13 unemployment.

14 Q Did you have any other source of funding at all?

15 A No, I didn't have any income. I mean, my kids had  
16 income, but I didn't have income personally myself.

17 Q Do you receive child support for your children?

18 A No, I don't receive child support for my children.

19 Q Do your children receive child support for them?

20 A No, they don't. My daughter received an SSI check, but  
21 she doesn't receive that anymore.

22 Q The oldest daughter, the 15-year-old?

23 A Yes. I only have one daughter.

24 Q So your family, your household, during those two years,  
25 the only money that was coming into it was through your

Johnson - Cross

1 daughter's social security check?

2 A Yes.

3 Q So I think we agreed that you haven't gone to the  
4 Brunswick County Circuit Court to ask them to issue you a  
5 restricted license.

6 Have you gone to the Brunswick County Circuit Court to  
7 ask them if you could convert your payments to them into a  
8 community service obligation?

9 A No. I wasn't aware of any of that. And how am I going  
10 to get to Brunswick? I have no license.

11 Q But the answer, though, is no --

12 A Yes.

13 Q -- you haven't done that?

14 Have you ever asked the Brunswick County Circuit Court to  
15 forgive the debt?

16 A No.

17 Q Before your license was suspended in 2016, were you aware  
18 that it could be suspended if you didn't pay the money that  
19 you owed the court?

20 A Yes.

21 Q The job you have right now, how much money do you believe  
22 that you can pay on a monthly basis from your existing income  
23 towards a payment plan? Like, \$5 a month? \$10 a month? Are  
24 you able to say?

25 A No. I don't have anything left over after my expenses

Johnson - Cross

1 with my household and my kids. I have nothing left because I  
2 also -- I have a child support obligation that I pay out,  
3 too.

4 Q Is that for a child who is not presently physically  
5 living with you?

6 A Yes.

7 Q How much is your child support obligation?

8 A 264.

9 Q What other monthly expenses do you have apart from that  
10 child support obligation? For example, do you have a phone  
11 bill?

12 A Yes, I do.

13 Q How much is that?

14 A \$100 a month.

15 Q Is that for your phone and your children -- and phones  
16 for your children, or just for you?

17 A No, me and my children.

18 Q Do you have a cable bill, like television, television  
19 cable bill?

20 A No. I don't have cable. We don't have cable.

21 Q Apart from your monthly child support obligation and your  
22 \$100 a month cell phone bill?

23 A Rent.

24 Q Rent. How much is your monthly rent?

25 A Currently my rent is \$200 right now.

Johnson - Cross

1 Q Do you have any other recurring monthly expenses that are  
2 set like that? So apart from, like, groceries, like, do you  
3 have a set electricity bill or water bill or anything like  
4 that?

5 A Just groceries.

6 Q Now, you mentioned that you were pulled over at one point  
7 and you were unaware that your license was suspended so the  
8 officer let you know that it was.

9 Where was that?

10 A In Waynesboro.

11 Q Okay. So that was in Waynesboro. And that was in 2017,  
12 September 2017?

13 A No. September 2017 is when I got the summons for court.  
14 It was before that.

15 Q I'm sorry. When did that happen, the prior action?

16 A I don't remember the exact date, but I know that I was on  
17 my way to work and he pulled me over.

18 Q So if you were on your way to work, would it be fair to  
19 say that was probably back in 2016?

20 A Uh-huh.

21 Q Or before that, but right around 2016?

22 A Uh-huh.

23 Q So your testimony is you were on your way to work, you  
24 got pulled over, the officer informed you that you were  
25 suspended for -- did he tell you why you were suspended, or

Johnson - Cross

1 did he just tell you you were suspended?

2 A He just told me that my license was suspended. He asked  
3 was I aware my license was suspended, and I told him no, I  
4 was not aware.

5 Q And at that time you were on your way to work?

6 A Yes, ma'am.

7 Q So you still had an income at that point, but you  
8 apparently then defaulted on your payment plan already?

9 A Yeah. Before I got that job, yeah.

10 Q Now, you mentioned the 2017 incident. And that was in  
11 Augusta County General District Court; is that correct?

12 A Yes.

13 Q And that's when you had the infraction for driving on a  
14 suspended license, right?

15 A Yes.

16 Q And you were assessed a \$100 fine and \$139 in court  
17 costs? Does that sound right?

18 A Yes, that's what the papers said.

19 Q So it's a \$239 total that you owe to that jurisdiction,  
20 correct?

21 A Yeah. It's more than that; but yeah.

22 Q You say that you think it's more than that. How much do  
23 you think it is?

24 A It's like -- when I checked it, it was, like,  
25 three-something. I think it was, like, three-something with

Johnson - Cross

1 interest or something.

2 Q So in the neighborhood of \$300 owed to Augusta General  
3 District Court?

4 A Yes, ma'am.

5 Q And then you still owe, you said, you think about \$700 to  
6 the Brunswick County Circuit Court, correct?

7 A Yes.

8 Q Okay. Are those the only two financial obligations that  
9 you're aware of that you owe to courts in the Commonwealth of  
10 Virginia right now?

11 A Yes.

12 MS. O'SHEA: If I could have just one moment, Your  
13 Honor.

14 BY MS. O'SHEA:

15 Q Now, isn't it also true, Ms. Johnson, that you are  
16 currently facing new felony charges in Albemarle Circuit  
17 Court?

18 A Yes.

19 Q And those felony charges are set to go before the Grand  
20 Jury on December the 3rd, correct? Yes?

21 A Yes.

22 Q Okay. And those are for felony failure to return bail  
23 property; is that correct?

24 A Yes.

25 Q But you're out of custody on that right now on a personal

## Johnson - Redirect

1 || recognizance bond, right?

2 A Yes.

3 Q Do you have any knowledge of what a conviction in that  
4 case would do to your employment prospects?

5 MS. CIOLFI: Objection, Your Honor.

6 THE COURT: Sustained.

7 MS. O'SHEA: Thank you, Judge. I don't have any  
8 other questions.

9 THE COURT: All right.

## REDIRECT EXAMINATION

11 | BY MS. CIOLFI:

12 Q Ms. Johnson, Ms. O'Shea ran through a number of minor  
13 traffic infractions from earlier in the 2000s where you paid  
14 your court costs and fines.

15 Did you try to pay when you could?

16 A Yes, I did.

17 Q And for the most recent charges, have you always tried to  
18 pay when you could?

19 A Yes.

20 Q When you -- when the Brunswick County Circuit Court gave  
21 you a \$100 payment plan, did they ask you how much you could  
22 afford?

23 | A No

24 || Q Could you afford that amount?

25 A No.

## Johnson - Redirect

1 Q Did anyone tell you in either Brunswick County or in  
2 Amherst County about the availability of a restricted  
3 license?

4 A No.

5 Q How did you know about it?

6 A I looked it up myself.

7 Q And you determined you were ineligible because you were  
8 unemployed; is that right?

9 A Yes.

10 Q And at the time that you were employed, would you have  
11 been able to pay the \$145 reinstatement fee --

12 A No.

13 Q -- in order to get the restricted license?

14 A No.

15 Q Did anybody at either of those courts tell you about  
16 community service being available?

17 A No.

18 Q And when you missed payments on your payment plan to  
19 Brunswick County, what happened?

20 A My license was re-suspended.

21 Q And did you get a hearing?

22 A No.

23 Q Did you get notice of it?

24 A No, I didn't receive any notice.

25 Q Have you tried to get on a payment plan recently?

## Johnson - Redirect

1 A Yes.

2 Q And what happened?

3 A I couldn't get on it because I had lost my job. And  
4 without me having a job, I can't pay on something.

5 Q And when did you try to get on a payment plan?

6 A It was the beginning -- it was, like, the end of  
7 September, beginning of October. Right when I lost my job.

8 Q And did either court -- so you called both courts,  
9 correct?

10 A Yes, I did.

11 Q And what did the courts say?

12 A Brunswick told me that they could restart me on a payment  
13 plan, I would pay the \$35 to start off, and then I would have  
14 to pay \$50 every two weeks on my payment arrangement.

15 And then I told the clerk that I would not be able to  
16 afford the \$100, \$50 every two weeks. And she told me that  
17 she was going to check and see if she could do something  
18 about it.

19 So when I reached back out to her, she had told me  
20 that -- asked me if I could pay \$25. I told her yes.

21 But Augusta, when I called Augusta Court, they told me  
22 that I have to come in there, I would have to bring in my  
23 compliance letter from DMV, and I would have to come in there  
24 before they can do anything about a payment arrangement.

25 Q And you would have to come in person?

## Johnson - Redirect

1 A In person to the court.

2 Q How far away is that?

3 A It's like 45 minutes.

4 Q And back to the Amherst County, where they said you could  
5 pay \$35 down and \$25 a month, why didn't you do that?

6 A Because I didn't have it. I don't have it. Like, the  
7 job that I have is, like, a low-paying job. And with a  
8 low-paying job, with me having my obligations with my  
9 children, child support, my obligations with taking care of  
10 my other two kids and being able to provide for them, it just  
11 leaves me with nothing, nothing at all.

12 MS. CIOLFI: Thank you, Ms. Johnson.

13 THE COURT: All right. Is that all?

14 MS. O'SHEA: Yes.

15 THE COURT: Thank you. You may step down. Call the  
16 next witness.

17 MS. CIOLFI: Judge, at this time I'd like to  
18 approach and give you this binder, which is the exhibits  
19 we've given to the Commonwealth, so you can follow along.

20 THE COURT: All right.

21 MS. CIOLFI: I'll pass that up.

22 Your Honor, before I call the next witness, in the  
23 exhibits that we just handed you, the first five exhibits are  
24 the declarations from the plaintiffs. You just heard from  
25 Ms. Johnson, Damian Stinnie, Melissa Adams, Williest Bandy,

Dugger - Direct

1 and Brianna Morgan.

2 And again, their statements are very similar to  
3 Ms. Johnson. Their licenses were suspended for failure to  
4 pay court fines and costs; none of them were asked by anyone  
5 at the court about their ability to pay; and all of them  
6 suffer, and continue to suffer, the immediate injury because  
7 of their license suspension. They're attached to the  
8 complaint as well, but we wanted to put them into evidence.

9 The next is the declaration of Llezelle Dugger, but  
10 I'll call Llezelle Dugger to the stand.

11 LLEZELLE A. DUGGER, CALLED BY THE PLAINTIFFS, SWORN

12 DIRECT EXAMINATION

13 BY MR. BLANK:

14 Q Please state your name for the Court.

15 A Llezelle Agustin Dugger.

16 Q And what's your current employment?

17 A I'm the clerk of court for the Charlottesville Circuit  
18 Court.

19 Q And how long have you been the clerk of the court?

20 A Since January 1st, 2012.

21 Q So that's approximately?

22 A Seven years.

23 Q Excellent. In your position as the clerk of the court,  
24 do you have knowledge of Virginia Code Section 46.2-395 and  
25 defendants' -- license suspensions because of defendants'

Dugger - Direct

1 failure to pay court debts and costs?

2 A I do.

3 Q In your position as clerk of the court, what is your job  
4 responsibility with regard to creating and maintaining court  
5 files, financial records, preparing court orders, charging  
6 and collecting fees due to the court, and preparing financial  
7 and other reports required to be submitted to state and local  
8 agencies?

9 A All of the above.

10 Q Tell us just a little bit more than "all of the above."

11 A When a case comes into the circuit court, myself, as well  
12 as the staff I have, we will enter it into what we call the  
13 Circuit Case Management System, which we call CCMS. It is a  
14 case management system run by the Supreme Court.

15 In addition, if there are any filing fees or bond that  
16 comes up from, say, general district court, we will receipt  
17 that into what we now call FAS. It used to be FMS. They  
18 upgraded -- "they" being the Supreme Court -- upgraded to the  
19 Financial Accounting System. Those two systems are  
20 intertwined in many ways.

21 For purposes of this hearing, when we have a criminal  
22 case that finishes at sentencing, my deputy clerk on the  
23 bench or myself, whoever is doing the case, will then enter  
24 the disposition in Case Management, and then also enter what  
25 the costs they're assessed, meaning the felony fixed fee or

Dugger - Direct

1 any add-ons, which then get transferred into FAS, which  
2 creates the financial accounting for the individual account.

3 Q You had submitted a declaration that we had put into the  
4 evidence before you stepped up. There you discuss FMS versus  
5 FAS.

6 Can you explain to the Court how FMS is different or the  
7 same as FAS?

8 A So when I started in 2012, the circuit court, the general  
9 district court, and the juvenile courts are all on FMS, which  
10 is Financial Management System. It's a DOS-based program  
11 written in Fortran code, which means I look at an amber  
12 screen with green letters on it, that I hadn't seen since  
13 before I got to college. So that was the first learning  
14 curve as a clerk, was relearning DOS and Fortran.

15 Last year, year and a half, the Supreme Court finally  
16 started rolling out a Java overlay on that program. And what  
17 they call the system now is FAS, which is Financial  
18 Accounting System.

19 I understand all our circuit courts that are with the  
20 Supreme Court are using it. I'm not quite sure if the  
21 District Courts have completely rolled out onto FAS. They  
22 may still be using FMS.

23 Q And how is FMS -- I think you started to say this. How  
24 is FMS integrated with the Case Management System, or CMS?

25 A I guess in layman's terms, they talk to each other. So

Dugger - Direct

1 when I and my deputies enter court costs into the Case  
2 Management System, it says this is how much we're assessing  
3 this defendant for this type of felony and any add-ons that  
4 the statute requires. That then gets transmitted to FMS, so  
5 then there's what's called an individual account that's  
6 created in FMS. When you type in a defendant's name, that  
7 will pull up how much they owe the court and for what.

8 We've got three number systems. You know, one is the  
9 felony fixed fee. One is internet crime that we collect, the  
10 fees; all the add-ons that we would do for court costs.

11 Q When a person fails to pay court costs or fines, what  
12 order is entered by a clerk or a judge with regard to a  
13 driver's license suspension for failure to pay court fines  
14 and costs?

15 A You mean at the time that they default?

16 Q Correct.

17 A When they're supposed to pay, my judge does not enter a  
18 separate order.

19 Q Does the clerk enter an order?

20 A No, sir.

21 Q How does the FMS system transmit the record of nonpayment  
22 to DMV?

23 A So at sentencing hearing, my judge will, or if we have a  
24 substitute judge, the substitute judge will say that the  
25 defendant is ordered to pay court costs and fines. My deputy

Dugger - Direct

1 clerk, through a chart, we have what those costs are. We  
2 assess them, and depending on what the Court says when the  
3 due date is -- so in our court, our judge will typically say  
4 the defendant is ordered to pay court costs and fines during  
5 the period of supervised probation.

6 So let's take, for example, the defendant gets a one-year  
7 sentence and he's placed on two years' supervised probation  
8 upon release from incarceration. My clerk will then put --  
9 there's a field in FMS and in CCMS that has the due date. So  
10 we will look at one year, plus the two years supervised  
11 probation, and the due date we put into our system will be  
12 three years from the date of sentencing, because that's the  
13 time period that the judge is deferring the payment of court  
14 costs for the defendant.

15 Q And then when that time hits, do you enter anything if  
16 somebody doesn't make a payment, or does it automatically go  
17 to DMV?

18 A So when the due date approaches, and passes, if no  
19 payment is made, DMV's computer system pings our systems, and  
20 it will then go to DMV that this person has failed to pay  
21 court costs. And then that person will then get a letter  
22 from DMV saying their license has been suspended for failure  
23 to pay court costs.

24 Q But your court doesn't enter an order that says that the  
25 license has been suspended?

Dugger - Direct

1 A Not at the time of default, no.

2 Q And you don't send a letter as the clerk that says your  
3 license is suspended?

4 A No, sir.

5 Q Ms. Ford from DMV, I think, is here. You don't know  
6 Ms. Ford, do you?

7 A No, sir.

8 Q Okay. Did you read her affidavit?

9 A I did.

10 Q In paragraph 6 of her affidavit, Ms. Ford states that DMV  
11 never receives physical paper copies of any orders.

12 Again, there are no orders that come; is that correct?

13 A Not at the time where someone fails to pay court costs,  
14 no.

15 Q And in paragraph 11, Ms. Ford states the clerk office  
16 inputs an indicator into the system to DMV that the court has  
17 suspended the driver's license of that person.

18 What is your response to that, the accuracy of that  
19 statement?

20 A So there's not any run-of-the-mill felony, but in a  
21 run-of-the-mill felony that is not driving-related, we just  
22 enter what -- the costs we enter. There's no field that says  
23 the license is suspended.

24 You compare that with a felony for -- or it could be a  
25 misdemeanor -- DUI or a drug conviction. In that, you will

Dugger - Direct

1 have a field that says: Is this DMV reportable? And it is,  
2 because under the statute there's a six months' loss of  
3 license under drug conviction. And depending what type of  
4 DUI it is, it's either a year, three years, or indefinite.  
5 And that does have a yes/no field for us that says, sent to  
6 DMV. And my deputies or I would put in yes if it's a drug  
7 conviction, if it's a DUI conviction. Leaving the scene of a  
8 crime after a car accident, that also is reportable.

9       But let's say grand larceny, when someone gets convicted  
10 of a grand larceny and we get to sentencing, there's no field  
11 there that we put that this is DMV reportable. That's  
12 different from the court costs.

13       And so no, I don't know what field she would be talking  
14 about, at the circuit court level, at least.

15 Q       And she indicates in her affidavit there's a field 14.

16       Do you have any knowledge of what a field 14 is?

17 A       We don't have numbers on our fields of the screens we  
18 see.

19 Q       In paragraph 14, Ms. Ford states that DMV must assume if  
20 the clerk included such indicator that the Court issued a  
21 suspension.

22       What's your response to that?

23 A       I don't issue a suspension, and my judge hasn't given me  
24 an order of suspension.

25       MR. BLANK: No further questions.

Dugger - Cross

1 THE COURT: Okay.

2 CROSS-EXAMINATION

3 BY MS. O'SHEA:

4 Q Good afternoon, Ms. Dugger.

5 A Good afternoon.

6 Q Just to follow up on a few questions, you would agree  
7 that there are different types of license suspensions that  
8 occur in the Virginia system, right?

9 A Yes.

10 Q I mean, there are mandatory suspensions by statute for  
11 different types of things?

12 A Yes.

13 Q And under some circumstances, DMV is the entity that  
14 makes the decision whether or not a suspension should be  
15 made, right?

16 A Yes.

17 Q So, like, for a DUI third offense, I think it is, you  
18 know, DMV will suspend a license upon entry of that  
19 conviction, right?

20 A Yes. And my judge also orders from the bench that --  
21 let's just take a DUI first. He'll order from the bench:  
22 Your punishment is one year loss of license. So he actually  
23 orders a suspension, loss of license. He orders a \$500 fine;  
24 suspends \$350 of it if they go to VASAP; and then a 30-day  
25 jail sentence, all suspended, is the typical first DUI

Dugger - Cross

1 sentence.

2 Q So all that information has to be communicated to DMV,  
3 right?

4 A It goes into our Case Management System, and then there's  
5 a field that says, yes/no, DMV.

6 If it's one of those -- drug, DUI, leaving the scene of  
7 the accident; anything that has that mandatory DMV  
8 suspension -- we put in a yes. And that's a field that comes  
9 up. So yeah, those would get to DMV via our computer.

10 We don't transmit the final sentencing order to DMV. We  
11 transmit it to DOC. We transmit it to the sentencing  
12 commission and the parties involved, Commonwealth Attorney  
13 and defense attorney, but we don't typically send the final  
14 sentencing order for those types of cases. For any type of  
15 cases, actually.

16 Q So the order the judge signs never goes out, but the  
17 information is sent, is my question; right?

18 A Depending on the case, yes, the information goes  
19 electronically.

20 Q Correct. Does it also go to, like, the state police to  
21 populate a VCIN, or to the FBI to populate a NCIC?

22 A So CCMS, and I believe also the general district court  
23 system, has an interface with DMV, and it also has an  
24 interface with the state police. They are currently working  
25 on an interface with DOC.

Dugger - Cross

1 Q So let's say you get back an order in one of these  
2 mandatory license suspension cases; a DUI third offense, for  
3 example. The Court has entered an order suspending an  
4 individual's driver's license for a year. You pull it up on  
5 your database. Is there, like, a specific code that keys to  
6 these different traffic felonies?

7 A Well, if done correctly, once it gets into our -- so DUI  
8 third is a felony, so there would have been a preliminary  
9 hearing down in general district court. So at the general  
10 district court level, from the magistrates, all the  
11 information regarding the statute he was charged under,  
12 whether it was a misdemeanor or a felony, would have all been  
13 entered. It comes up to our system from general district  
14 court once it gets certified. So all that is typically all  
15 filled in when we get there.

16 What my clerks and I will then fill in is the  
17 disposition --

18 Q Correct.

19 A -- that the Court orders from the bench. So, you know,  
20 one year loss of license will go in. There's a field -- in  
21 there, when you pull up that statute, there's a field in  
22 there that says "operator license suspended." Then you put  
23 in what period of time it's suspended.

24 Q Right. So then you finish filling out these fields,  
25 right?

Dugger - Cross

1 A Yes, ma'am.

2 Q And so then how is it that the finalized record is  
3 transmitted out, like, to DMV or to the other authorities  
4 that you're talking about your computer is interfacing with?

5 A So my understanding is that DMV's computer will ping the  
6 state system at regular intervals. And these will then come  
7 up to DMV to show -- particularly when we say, yes, this goes  
8 to DMV, then it will go to the DMV computer system, and they  
9 do with it what they need to do with it.

10 Q You said that's your understanding, this pinging. Is  
11 that something you've talked about to somebody, or is that  
12 your assumption of how it happens?

13 A It's -- no, it's not an assumption. It's what they -- so  
14 as a new clerk or as a deputy clerk, we have new training,  
15 ongoing training. So at our training we are taught by OES  
16 what the interface means.

17 So, for example, the state police interface, that pings  
18 every 15 minutes. That will pick up stuff, particularly sex  
19 offense crimes. So that has a faster ping rate than the DMV.

20 Q So when you say "ping," do you mean kind of like prodding  
21 your system to put out any new information that's been  
22 entered since the last time it was prodded?

23 A It's computer talking to computer, basically.

24 Q So I'm trying to figure out what your understanding is,  
25 though, of this pinging. Is that the outside system telling

Dugger - Cross

1 your system to transmit any new information that's been  
2 entered? Is that what it is?

3 A That would be my understanding. But the programmers at  
4 OES are probably the better folks to ask how the mechanics  
5 work. We enter the information, and at some point it goes to  
6 DMV electronically.

7 Q Okay. So then you were testifying before about a fines  
8 and costs situation in a non-traffic felony. So let's say  
9 we've got a grand larceny, assessed fines and costs; your  
10 judge gave them three years to pay; the three years has come  
11 up. And you testified that DMV's computer pings your  
12 computer.

13 A So when we put in a due date -- so what's today?  
14 November 15th, 2018. So, three years, I'm going to put in a  
15 due date that your court costs are due November 13th, 2021.  
16 If you don't make a payment when that due date passes, it  
17 goes into a report, I guess, for lack of a better term. And  
18 it will be 30 days -- well, now it's 40, because the law  
19 changed. 40 days it will sit there to see if someone pays.

20 If nothing happens, if no payment is made or nothing, if  
21 they don't enter into a payment plan or do something, on day  
22 41, that report is automatically transmitted to DMV stating  
23 that someone has failed to pay their court costs.

24 Q And what form does that report take?

25 A I -- there's no -- there's a report called IN05. And

Dugger - Cross

1 that tells me when you look at it which ones were sent off to  
2 DMV.

3 What DMV receives in terms of their report, I can't speak  
4 to that.

5 Q Is that something that you review before it's  
6 transmitted?

7 A Yes. Just in case someone did make a payment, someone  
8 did enter a payment plan and it mistakenly got into this  
9 report, I have a deputy, and my chief deputy and I review  
10 that to make sure, as much as possible, we don't have  
11 someone's license suspended by DMV that shouldn't be.

12 Q So as a clerk, you want to make sure that your  
13 recordkeeping is accurate --

14 A Correct.

15 Q -- so that you're not sending stuff off to DMV that's not  
16 true?

17 A Correct.

18 Q All right. So when you're looking over this report that  
19 reflects, you know, an individual hasn't paid their fines and  
20 costs, as a clerk's office, do you send another letter to  
21 that individual letting them know that their driver's license  
22 is about to be suspended?

23 A No, ma'am.

24 Q Do you or anyone in your office call that individual or  
25 take any steps to let them know that their license is about

Dugger - Cross

1 to be suspended?

2 A No.

3 Q Reach out to them, do anything at all to see why they  
4 haven't paid their fines and costs?

5 A No, ma'am.

6 Q Would you agree that the authority for creating  
7 installment plans and payment plans is with your office?  
8 You're able to do that, right?

9 A It's with the court. So the judge actually has to sign  
10 the order on payment plans. But my judge has given our  
11 office some discretion, up to a certain point. If someone  
12 owes less than, I think it's \$2,500, we can sign off on that.  
13 But anything above that, our judge likes to review the  
14 payment plan.

15 Q So is that the order from November 1st, 2015 that  
16 delegated certain responsibility to your office for different  
17 payment plans? Is that what you're referring to?

18 A Yes.

19 Q I have handed you a document that reads something along  
20 the lines of "Guidelines for Installment Payment Plan  
21 Options," correct?

22 A Yes, ma'am.

23 Q And there's a judge's signature there on that form,  
24 correct?

25 A Yes.

Dugger - Cross

1 Q And then your signature appears on that form as well,  
2 right?

3 A Yes.

4 Q And is that the guidelines that you were talking about in  
5 terms of your office and your authority to set up installment  
6 payment plans without having to go to a judge first?

7 A Correct.

8 Q If you've got a situation that falls outside the scope of  
9 those particular guidelines there, and you said the judge  
10 wants to review it, how does that happen?

11 A So anytime someone comes into our office wanting to set  
12 up a payment plan, they will typically meet with either  
13 Ms. Pugh, Mr. Schmidt, or myself, because the form,  
14 application, the petition for payment plan, has detailed  
15 information regarding what's your take-home pay, what are  
16 your expenses, and things like that. So we go over it with  
17 them to make sure it's accurate. We don't want all zeros.

18 If it doesn't fall within the parameters that my office  
19 has discretion to sign off on it, we then submit that  
20 petition up to the judge, and the judge will review it, and  
21 then we'll -- in the bottom part, in the order part, we'll  
22 order "approved" or put in whatever payment plan conditions  
23 he may require.

24 Q Okay. And once the judge has done that, approved or  
25 modified a payment plan that's been submitted to him for

Dugger - Cross

1 consideration, how is the debtor notified that the payment  
2 plan has been approved?

3 A So if a payment plan comes back down from the judge's  
4 office, Ms. Pugh, she runs point on it. She will call the  
5 person and say, We have a certified copy of the payment plan  
6 for you to come pick up. Because they need to take that to  
7 DMV so that they can show DMV that they have an active  
8 payment plan so that DMV can unsuspend or unrestrict --  
9 unsuspend their license.

10 Once we have the order, we also enter all that  
11 information into their individual account, and we put in that  
12 it's under a TTP, which is a time-to-pay plan. And then we  
13 put in whatever due date is next. So we would probably say  
14 January 1st, 2019, your first payment of \$50 a month is due,  
15 or whatever date the judge wants to put in there.

16 And so that's how that individual account is then created  
17 for that payment plan.

18 Q So when someone goes on an installment payment plan  
19 that's been either approved through your office or approved  
20 through the judge, either way, let's say they make payments  
21 for a certain period of time -- six months, a year -- and  
22 then they stop making payments.

23 What steps are taken by your court or by your office to  
24 let the debtor know that they are missing payments?

25 A Nothing. We have over 1,500 cases any given year. We

Dugger - Cross

1 have probably over 700 folks on payment plans, if not more,  
2 at any given day. And the computer does all of that.

3 If there is no payment made by the due date, it goes into  
4 that 40-day window. And if nothing happens in 40 days, day  
5 41, DMV is then electronically sent that this person has  
6 paid -- has failed to pay their court costs.

7 Q So the situation where someone who has been on an  
8 installment plan and then defaulted, they also appear on that  
9 40-day report that you were talking about earlier?

10 A Yes, ma'am.

11 Q Does your office -- does your jurisdiction offer  
12 community service as an option for remitting fines and costs?

13 A On a case-by-case basis. That's completely within the  
14 judge's purview.

15 Q Are you -- do you have any knowledge of how this system  
16 operated before we had these computers that talk to each  
17 other?

18 A No. The computers were there when I started as a clerk.  
19 Prior to that, as a defense attorney, I had no clue how all  
20 that would work.

21 Q Fair enough. Would you agree, though, that somebody has  
22 to make this information available for DMV to even know that  
23 there are outstanding fines and costs that have not been  
24 paid?

25 A Yes. And the report, like I said, once the due date has

Dugger - Cross

1 passed, that's the report that goes to DMV; so that's how DMV  
2 gets notified electronically through the computer systems.

3 Q And would you agree that when you look at the statute,  
4 the language of the statute actually says "the Court shall  
5 suspend," right?

6 A That's what the statute says.

7 MS. O'SHEA: If I can just have a moment.

8 THE COURT: If a person makes a partial payment, say  
9 they're supposed to pay \$50 a month and they pay \$25, is  
10 there an exception made automatically by you with regard to  
11 sending the report to DMV?

12 THE WITNESS: My staff would have the discretion to  
13 ask Judge Moore if this is something we could do and then  
14 change the due date to say that something has been paid.

15 I've been fortunate that both Judge Moore and Judge  
16 Hogshire before him have been very liberal in helping folks  
17 make their court costs possible, and their payments. And so  
18 there is a lot more liberalness in my court, and I understand  
19 that. And that's because I've worked for two judges, with  
20 two judges, that really do believe folks need their driver's  
21 license.

22 BY MS. O'SHEA:

23 Q Would you agree that -- if you know. The system that you  
24 have in place in Charlottesville, you know, you have intimate  
25 knowledge of that. Would you agree that it's different from

Dugger - Cross

1 jurisdiction to jurisdiction to jurisdiction around the  
2 Commonwealth?

3 A So every -- I'm just going to talk about circuit courts.  
4 Every circuit court except Fairfax and Arlington are on  
5 the Case Management System and on the Financial Accounting  
6 System that the Supreme Court has.

7 Q Do you mean Arlington or Alexandria?

8 A Alexandria. I'm sorry. I get the As confused.

9 Q I'm not talking about the computers. I'm talking about  
10 your mechanisms for installment plans and approval for the  
11 judges, and what you offer, and so on and so forth.

12 A Correct. So the Supreme Court promulgated a rule saying  
13 each circuit court should have available installment or  
14 deferred payment plans for defendants to enter into one.

15 We've always had it, even before then. We just put it  
16 into writing once that rule was promulgated.

17 But as people like to say, there's 120 different ways to  
18 do things in Virginia because there are 120 different circuit  
19 courts. And each clerk is elected. Each clerk has a  
20 different judge. So it literally varies from circuit court  
21 to circuit court.

22 Q Right. So, like, a deferred payment plan that might be  
23 okay or acceptable in Charlottesville might not be okay in  
24 Augusta County or Harrisonburg or somewhere else?

25 A Yes, that's correct.

## Dugger - Redirect

1 Q Ms. Dugger, you serve on the advisory board for the Legal  
2 Aid Justice Center here in Charlottesville; is that correct?

3 A I do, for about five years now.

4 MS. O'SHEA: Okay. Very nice. Thank you.

5 I don't have any other questions.

6 THE WITNESS: Do you want your exhibit back?

7 MS. O'SHEA: If I could have that marked and  
8 admitted as Defendant's Exhibit 1.

9 MR. BLANK: No objection.

10 THE COURT: It will be admitted.

11 (Defendant's Exhibit 1 admitted)

12 REDIRECT EXAMINATION

13 BY MR. BLANK:

14 Q Ms. Dugger, just a short follow-up. I heard about the  
15 120 jurisdictions and circuit courts and that the payment  
16 plans may be a little bit different, but once a person  
17 defaults, once a default has occurred, the process is the  
18 same for every jurisdiction with regard to the FMS, FAS  
19 system, and CMS?

20 A Yes. Once the due date passes or the time-to-pay date  
21 has passed, the report will go to DMV on day 41.

22 Q And then DMV will suspend, correct?

23 A That's when they will get the suspension letter from DMV,  
24 yes.

25 MR. BLANK: Thank you.

## Dugger - Redirect

1           Oh, Your Honor, if we could have one second.

2           (Counsel conferring)

3 BY MR. BLANK:

4 Q   And on that \$25, if there was a change, that would have  
5 to go to DMV in order for there to be a change in the due  
6 date?

7 A   We would do a -- and that's why it has to go up to Judge  
8 Moore. We need to do a new payment plan.

9 Q   And it will go to DMV by default unless you change the  
10 due date?

11 A   Yes. If a due date comes and I haven't or one of my  
12 staff members has not changed it, the computer will  
13 automatically send it to DMV.

14           MR. BLANK: Okay.

15           THE COURT: All right. Thank you.

16           MR. BLANK: Judge, before I call Ms. Moats to the  
17 stand, I'd like to turn your attention to tab 7 and tab 8 in  
18 the book, specifically tab 7 to start with, Your Honor. And  
19 you have to go pretty far back in the back, but it's on page  
20 6-4. And what you're looking at, Your Honor, this is a  
21 record, it's from the Virginia Commonwealth auditor of  
22 accounts -- excuse me, Auditor of Public Accounts. It's in  
23 our brief. There's a website link that you can access to  
24 actually see this.

25           But if you go to page 6-4, this is the audit of a

Moats - Direct

1 circuit court, and it says, "All unpaid accounts are  
2 submitted to the Department of Motor Vehicles for license  
3 suspension and each unpaid case must be submitted to the  
4 Department of Taxation for set-off debt collection for at  
5 least three years."

6 Again, we want to note that the agency, the Auditor  
7 of Public Accounts, is stating that the Department of Motor  
8 Vehicles is the one that suspends the license.

9 Second, Judge Moon, we'd like to turn your attention  
10 to tab 8, and that is a 2000 report. It's a special report.  
11 It's a review of Virginia courts management unpaid fines and  
12 costs, again the Auditor of Public Accounts. And if you go  
13 on the top of page 5 -- and this goes to this statement of  
14 FMS and CMS. And the acronyms get a little bit fuzzy for me,  
15 but if you look at the top of page 5, the system also  
16 interfaces with the Department of Motor Vehicles for  
17 automated submission of license suspension. And that goes  
18 back to Ms. Ford's affidavit, paragraph 8, that says, "DMV  
19 receives no information via the financial management system."

20 It's clear these systems are talking to each other.

21 At this time we'll call Ms. Moats.

22 JULIE MOATS, CALLED BY THE PLAINTIFF, SWORN

23 DIRECT EXAMINATION

24 BY MR. BLANK:

25 Q Can you state your name for the record, please?

Moats - Direct

1 A Julie Moats.

2 Q And where do you currently work, Ms. Moats?

3 A At the Charlottesville Circuit Court.

4 Q And what's your job title?

5 A Deputy clerk.

6 Q And how long have you been in that position?

7 A I've been there a little over two years.

8 Q Excellent. And before you were deputy clerk of the  
9 circuit court, where did you work?

10 A I was at the Charlottesville General District Court.

11 Q And how long did you work at the -- what was your title  
12 there?

13 A I was deputy clerk.

14 Q And how long did you work at the general district court?

15 A That was actually a little over two years.

16 Q I -- did I -- did you have an opportunity to review  
17 Ms. Ford's affidavit in this case?

18 A Yes.

19 MR. BLANK: And I just want to let the record show,  
20 Your Honor, that I correctly grabbed the ring of the Elmo  
21 instead of the top of it.

22 THE WITNESS: As you so practiced earlier.

23 BY MR. BLANK:

24 Q And this document was attached to Ms. Ford's affidavit.  
25 It's titled "CASINO Inquire CAIS Original Transaction."

Moats - Direct

1       As a deputy clerk for the circuit court and deputy clerk  
2 of the general district court, have you ever seen this  
3 document before?

4 A   No, I have not.

5 Q   As a deputy clerk for the general district court or the  
6 circuit court, did you ever fill out this document or screen?

7 A   No, I have not.

8 Q   When Ms. Ford put in her affidavit, paragraph 11 and 12,  
9 that the clerk's office inputs an indicator in the system in  
10 identified field 14, CTORNIND -- which, Judge, is right there  
11 on the document -- what is your knowledge of such indicator?

12 A   I have none.

13 Q   And what is your knowledge of field 14?

14 A   I have no knowledge of a field 14. None of our fields  
15 have numbers, or at the general district court, either.

16 Q   From your observation and knowledge as a general district  
17 court clerk, who suspends a driver's license for failure to  
18 pay court fines and costs? The court, the clerk, or DMV?

19           MS. O'SHEA: Your Honor, I'm going to object to the  
20 extent that requires a legal conclusion.

21           THE COURT: Well, she can testify as to what they  
22 do, but not more.

23           THE WITNESS: DMV.

24           THE COURT: I'll accept it as evidence, a lay  
25 opinion.

Moats - Cross

1 MR. BLANK: Understood, Your Honor.

2 BY MR. BLANK:

3 Q Does the judge enter a suspension order for a driver's  
4 license for failure to pay court costs and fines?

5 A Not for failure to pay court costs and fines, no.

6 Q Does the clerk?

7 A No.

8 Q How long after the conviction did DMV -- how long after  
9 the conviction would it take before DMV suspended a license  
10 for failure to pay court fines and costs?

11 A On the 41st day. It used to be 30, and then it increased  
12 to 40; and on the 41st day.

13 Q And how did that happen in the general district court?  
14 As you heard Ms. Dugger describe how it does in the circuit  
15 court, tell us how it happened in the district court.

16 A When someone does not pay their fines and costs, they had  
17 that time period in which to pay, and if they didn't pay on  
18 the 41st day, the computers would talk to each other and DMV  
19 would suspend their license.

20 Q And was there ever an order on that 41st day from the  
21 general district court ordering you to suspend the license?

22 A No, I didn't -- we didn't suspend their license.

23 MR. BLANK: No further questions.

24 THE COURT: Okay.

25 CROSS-EXAMINATION

Moats - Cross

1 BY MS. O'SHEA:

2 Q Good afternoon, Ms. Motts. I'm going to talk --

3 A Moats.

4 Q Moats. Sorry. Moats.

5 I'm going to talk specifically about general district  
6 court and traffic court in Charlottesville.

7 A Okay.

8 Q All right. Traffic court is held in general district  
9 court, right?

10 A Yes.

11 Q So people come to general district court and they've been  
12 charged with a set of traffic infractions, right?

13 A Uh-huh.

14 Q Okay. And they show up for their hearing and they come  
15 before the judge, and let's say the judge elects to  
16 adjudicate them guilty of the traffic infractions, right?

17 A Sure.

18 Q And the judge assesses a particular sentence or fines or  
19 costs, or whatever he elects to do for those fines and costs,  
20 from the bench in general district court, right?

21 A He generally has to follow the laws, yes.

22 Q Okay. So he will say, for example, I'm going to, you  
23 know, convict you of speeding, I'm going to impose a  
24 statutory fine and costs; something like that, right?

25 A Yes.

Moats - Cross

1 Q And then before him he's going to have a uniform summons,  
2 usually, right?

3 A Yes.

4 Q Or some sort of warrant of arrest?

5 A Talking about traffic infractions, it would be a uniform  
6 summons.

7 Q So he's going to note his disposition, usually, on that  
8 document, correct?

9 A Uh-huh. Uh-huh.

10 Q And then when the Court assesses whatever that sentence  
11 is, the individual is in court usually, but not necessarily  
12 always, right?

13 A Correct.

14 Q Because there are certain traffic infractions for which  
15 you can be found guilty in absentia?

16 A Yeah, you can be found guilty of all of them in absentia.

17 Q For the traffic infractions, but not the traffic  
18 misdemeanors?

19 A Well, if you're not there, you're going to get a capias;  
20 but yeah.

21 Q So in any case, I'm talking about a situation when the  
22 person is present in court. All right?

23 A Okay.

24 Q And hears the judge pronounce sentence. Okay?

25 A Okay.

Moats - Cross

1 Q And then that document gets taken to the clerk's office  
2 in general district court in some manner of speaking, right?

3 A Okay.

4 Q Either there's a -- well, if I'm wrong, tell me. Don't  
5 assume.

6 So there's probably the clerk sitting in the courtroom  
7 who gets the documents from the judge, right?

8 A Yes.

9 Q And then someone in the clerk's office is responsible for  
10 inputting that information into your computerized system,  
11 right?

12 A Yes.

13 Q So you look at what the judge has ordered, and you put it  
14 in the system, right?

15 A Yes.

16 Q So let's say the court has imposed a certain amount of  
17 fines and costs in a particular case, the individual has been  
18 given the 30 days, 40 days, however you want to phrase it, to  
19 pay, right?

20 A That's not ordered by the judge. That's an automatic.  
21 That's a state law.

22 Q But that's automatic?

23 A Yeah.

24 Q So the Court imposed fines and costs. You input into  
25 your system whatever it is the Court ordered?

Moats - Cross

1 A Yes, the amount that they owe.

2 Q Right. So let's say day 40 rolls around and the  
3 individual who has been assessed the fines and costs hasn't  
4 paid their fines and costs. Now, we heard from Ms. Dugger  
5 with respect to circuit court that, basically, they generate  
6 an order, review it, and then send it on to DMV.

7 MR. BLANK: Objection, Judge. That's not what she  
8 testified to.

9 THE COURT: Well, just ask her --

10 THE WITNESS: Yeah, I'm confused.

11 BY MS. O'SHEA:

12 Q So you're saying the person --

13 THE COURT: Just rephrase the question.

14 MS. O'SHEA: Okay.

15 BY MS. O'SHEA:

16 Q Day 40 rolls around, the person hasn't paid. What does  
17 the general district court do with that information?

18 A Nothing.

19 Q Do you generate a report?

20 A No.

21 Q Do you contact the individual who has defaulted?

22 A No.

23 Q Do you take any measures to go back and look at the  
24 accounting and make sure that the person who hasn't paid,  
25 that it's not just been entered incorrectly at some point in

Moats - Cross

1 the system?

2 A I as a deputy clerk, no.

3 Q Anybody in the office?

4 A I can't speak on the clerk herself.

5 Q Okay. To your knowledge, does anybody do that

6 doublecheck of the failure to pay on day 40?

7 A Not to my knowledge.

8 Q Are deferred payment plans and installment payment plans

9 offered in the Charlottesville General District Court?

10 A Yes.

11 Q Is community service offered as an option in the

12 Charlottesville General District Court?

13 A I do not deal typically with payment plans, but I have  
14 heard that they are up to the judge.

15 Q If somebody wants to go on a deferred payment plan in the  
16 general district court as opposed to the circuit court, what  
17 are they supposed to do?

18 A They would ask.

19 Q Ask who?

20 A They would just come to the clerk's office and say, I  
21 want to enter a payment plan. And then we have them fill out  
22 the financial form and we -- they go in to talk to the judge,  
23 and the judge puts them under oath regarding their financial  
24 status and sets them up on a plan.

25 It's usually -- down at the general district court, Judge

Moats - Cross

1 Downer is usually very generous. He does not want anyone to  
2 not have a license.

3 Q Okay. So the person -- that's the process: The judge  
4 puts them under oath and the judge decides what the payment  
5 plan is going to be?

6 A Yes.

7 Q With respect to the Charlottesville General District  
8 Court, is there a minimum monthly payment, an amount that has  
9 to be on that installment plan?

10 A I cannot speak to that. I don't have anything to do with  
11 the plans in Charlottesville Circuit Court. I'm in land  
12 records at the circuit court.

13 Q What about when you were in general district court? My  
14 questions are all focused on general district court.

15 A Oh, at general district court?

16 Q Yes, ma'am.

17 A What was the question about?

18 Q Was there a minimum amount that had to be paid per month  
19 in order to enter into a deferred payment plan in general  
20 district court, or an installment payment plan?

21 A To my recollection, Judge Downer would, depending on  
22 their finances, sometimes ask for a certain amount down and  
23 then a certain amount a month. And then if they couldn't  
24 afford that for whatever reason, to -- asked him to reduce it  
25 or he would renegotiate or redo their financial plan.

Moats - Cross

1 Q So it varied according to the circumstances?

2 A Yes.

3 Q Now, with respect to someone who has been found guilty in  
4 absentia, so they didn't show up in court --

5 A Okay.

6 Q -- and the Court just imposed, say, the statutory fine  
7 for a speeding offense and then, like, a \$25 court cost on  
8 top of that. All right?

9 A Uh-huh.

10 Q How is the information relative to that sentence  
11 communicated to the person who didn't show up in court?

12 A How do they know that they owe money?

13 Q Correct.

14 A The next day after trial, when someone has been tried in  
15 absence, the court mails out a 225.

16 Q What is a 225?

17 A It's a DC225. It's a notice to pay, which tells them  
18 they have 40 days to pay, or enter into a payment plan.

19 Q Or their license will be suspended?

20 A I don't -- I'm not sure if it says that. I just know it  
21 says that they owe fines. I'm not sure exactly of the  
22 wording of it. It's a 225. I don't know the wording of it  
23 precisely.

24 Q Okay.

25 A Sorry.

Moats - Cross

1 Q And that 225 form is going to be mailed to the person's  
2 last known address of record, correct?

3 A Which would have been what's on the summons that was on  
4 their driver's license.

5 Q Do you ever get those returned as, you know, the  
6 recipient not found, recipient unavailable?

7 A Occasionally.

8 Q If those were returned, you know, the person wasn't at  
9 the address that was written down on the uniform summons,  
10 what, if anything, does your office do with that information?

11 A You know, I wasn't in charge of anything that had to do  
12 with those, so I'm not sure exactly what they did with them.

13 Q And you said that you work in land records now in circuit  
14 court?

15 A Uh-huh. Yes.

16 Q In your position in circuit court, have you ever been  
17 responsible for inputting information relative to criminal  
18 convictions?

19 A No, ma'am.

20 MS. O'SHEA: Thank you. I don't have any other  
21 questions.

22 THE COURT: Is that all?

23 MR. BLANK: She's free to go. Thank you, Ms. Moats.

24 Judge, if you follow along in the -- in the notebook  
25 that we submitted, there are four documents that we wanted to

Moats - Cross

1 draw attention to the Court. They're behind tab 9, 10, 11,  
2 and 12. These are screenshots from four District Courts.  
3 One is from Charlottesville. And if you go to the second  
4 page, in all caps bold: "IF YOUR AMOUNT HAS NOT BEEN PAID IN  
5 FULL OR AN EXTENSION HAS NOT BEEN GRANTED, YOUR DRIVER'S  
6 LICENSE WILL BE SUSPENDED BY DMV." That's one.

7 Number two is Albemarle. Not in bold, but it's in  
8 there, and it says: "If payment in full is not made by the  
9 due date, your driver's license will be suspended by DMV."

10 11 is from Chesterfield County. And in Chesterfield  
11 County, on page 1: "Notification is sent to the Department  
12 of Motor Vehicles for suspension of defendant's operator's  
13 license."

14 And then Henrico County, which is the smallest  
15 print -- I know it's in here because I wrote it out. It  
16 says, "You will have 30 calendar days to pay" -- I'm looking  
17 for it, Judge. Why can't I find it? I think I'm missing a  
18 page on mine, Judge. We'll go back and find it. My notes  
19 say: "You will have 30 calendar days to pay all fines and  
20 costs owed to the court. Failure to pay your fines and costs  
21 will result in your privilege to drive being suspended or  
22 revoked by the Virginia Department of Motor Vehicles."

23 Your Honor, at this time, I'll pass the podium over  
24 to Ms. Pazandak.

25 Was that the correct pronunciation, or was I close?

Pearce - Direct

1 MS. PAZANDAK: Pazandak.

2 MR. BLANK: Pazandak. I apologize. She's been pro  
3 hac'd into this court. She's with McGuire, Woods, and she  
4 will take the examination of Diana Pearce.

5 THE COURT: All right.

6 MS. PAZANDAK: Plaintiffs call Dr. Diana Pearce.

7 MS. O'SHEA: Your Honor, to the extent it's helpful,  
8 before Ms. Pearce testifies we're certainly willing to  
9 stipulate that driving is an important part of people's lives  
10 and that it's harder to get to work when you don't have a  
11 driver's license. If that's basically what Ms. Pearce is  
12 going to testify to, we're happy to stipulate that if this  
13 will move things along.

14 THE COURT: Well, you can take that as agreed to,  
15 admitted, and not touch on those matters --

16 MS. PAZANDAK: Okay.

17 THE COURT: -- any further.

18 MS. PAZANDAK: Understood.

19 DIANA PEARCE, Ph.D., CALLED BY THE PLAINTIFFS, SWORN

20 DIRECT EXAMINATION

21 BY MS. PAZANDAK:

22 Q Dr. Pearce, can you please state your name?

23 A Diana Pearce.

24 Q And where do you live?

25 A Seattle, Washington.

Pearce - Direct

1 Q And where are you currently employed?

2 A University of Washington.

3 Q What's your title at the University of Washington?

4 A I'm a senior lecturer and director of the Center for  
5 Women's Welfare.

6 Q How long have you held that position?

7 A I've been at the university for 20 years.

8 Q And what are your current job responsibilities?

9 A I direct the Center for Women's Welfare and teach as  
10 required, and the center conducts research.

11 Q What is the subject of your research?

12 A Basically, what we do is we calculate and write reports  
13 and analyze data using a measure that I developed called The  
14 Self-Sufficiency Standard.

15 Q And where did you work before the University of  
16 Washington?

17 A I was in Washington, DC. I had an independent project  
18 called the Women in Poverty Project associated with wider  
19 opportunities for women.

20 MS. PAZANDAK: Your Honor, may I approach the  
21 witness?

22 THE COURT: You may.

23 BY MS. PAZANDAK:

24 Q Dr. Pearce, I'm handing you a stack of documents, and  
25 we'll go through them. I'll put them on the screen.

Pearce - Direct

1       Can you identify the first document in front of you?

2   A   It's my curriculum vitae.

3   Q   And Dr. Pearce, is this a true and accurate copy of your  
4   CV?

5   A   Yes, it is.

6   Q   Where did you go to college, Dr. Pearce?

7   A   I went to the College of Wooster in Wooster, Ohio.

8   Q   And what degree did that lead to?

9   A   Bachelor's degree in sociology and history.

10                  MS. O'SHEA: Your Honor, is there some sort of --  
11          are we leading up to a request to certify as an expert? So  
12          if you can tell me the field, because I may be able just to  
13          stipulate to that so we don't have to walk through the entire  
14          CV.

15                  MS. PAZANDAK: Sure. We would like to qualify  
16          Dr. Pearce as an expert in The Self-Sufficiency Standard,  
17          which is a standard that she created. It talks about whether  
18          someone's income is adequate to meet their basic needs for  
19          housing, food, healthcare, other basic costs. We'd also like  
20          to qualify her as an expert witness in the self-sufficiency  
21          standard as compared to the federal poverty level and the  
22          self-sufficiency standard for the Commonwealth of Virginia.

23                  MS. O'SHEA: So you want to qualify her as an expert  
24          in the standard that she created, basically?

25                  MS. PAZANDAK: Yes.

Pearce - Direct

1 MS. O'SHEA: And what is the relevance of that  
2 standard to this litigation?

3 MS. PAZANDAK: We think it's a more appropriate  
4 measure than the federal poverty level to say whether someone  
5 has enough income to be able to meet their basic needs and  
6 pay court costs and fines or make payments on a payment plan.

7 MS. O'SHEA: Your Honor, I'm not sure that it's  
8 relevant, Your Honor, but I certainly stipulate that she's an  
9 expert in the standard that she has created and published  
10 about.

11 THE COURT: All right. You may proceed.

12 BY MS. PAZANDAK:

13 Q Okay. Dr. Pearce, can you tell us what The  
14 Self-Sufficiency Standard is?

15 A The Self-Sufficiency Standard is a measure of income  
16 adequacy based on a basic needs budget. It varies by where  
17 you live and it varies by your family composition, including  
18 the number of adults and children and the ages of children,  
19 because costs differ by age of children, such as childcare.

20 Q And when was it developed?

21 A I developed it and first calculated it in 1996 for the  
22 State of Iowa under a grant from The Women's Bureau, the  
23 United States Women's Bureau.

24 Q And why was the standard developed?

25 A The standard was developed because I was doing research

Pearce - Direct

1 on the performance standards used in job training programs,  
2 which at that time were called JTPA and now are called WIOA,  
3 Workforce Investment Opportunity Act.

4 They measured -- the performance standard was  
5 self-sufficiency, but they measured it by averaging together  
6 all the participants in a program's wages. It didn't take  
7 into account what it took to be self-sufficient.

8 So a single person would need much less income to be  
9 self-sufficient than, say, a person with children to support.  
10 And by putting everybody together, you ignored that and you  
11 weren't really measuring self-sufficiency. So I was asked to  
12 develop that.

13 So I drew upon a number of sources, looking at the  
14 various critiques of the federal poverty level, as well as  
15 others who had developed a similar thing. But not really  
16 developed it, just had, you know, put out some ideas for  
17 doing this by building it up from the various basic needs.

18 Q Okay. So how did you go about developing the standard?

19 A So the way I -- you mean how do I calculate it?

20 Q Yes.

21 A What we do is we take basic needs -- housing, food,  
22 childcare, transportation, healthcare, plus, of course, and  
23 miscellaneous, which covers things like clothing and personal  
24 necessities, household necessities like soap, and as well as  
25 taxes and tax credits, because everybody has to pay taxes --

Pearce - Direct

1 and then we look at those costs using credible government  
2 sources, such as Census Bureau, Housing and Urban Development  
3 for housing costs, the food budgets from the United States  
4 Department of Agriculture.

5 So we use credible sources that also distinguish those  
6 costs by geography and by age, as appropriate.

7 Q And how is The Self-Sufficiency Standard different from  
8 the federal poverty level?

9 A Well, the federal poverty level was developed in the  
10 1960s by Mollie Orshansky. At the time, the only standard we  
11 had for what you needed to meet your basic needs was  
12 nutrition standards from those USDA food budgets.

13 So she used a food budget, and at that time people spent  
14 about a third of their income on food; the average family  
15 spent a third of their income on food. So she just  
16 multiplied food times three. Well, that froze -- and it's  
17 only been updated for inflation since then. So that froze in  
18 place that relationship between food and other things. And,  
19 of course, food is one of the things that's increased the  
20 least of all. As everybody knows, housing and healthcare  
21 have increased enormously, particularly in recent years.

22 So what we do is allow each of those costs to increase  
23 independently of each other. So there's not a fixed ratio of  
24 one-to-three like there is in the federal poverty level.

25 Also, the federal poverty level, she didn't have the

Pearce - Direct

1 data. It doesn't vary geographically, so it doesn't take  
2 account of the very different costs of living.

3 We take account of the different costs of living to the  
4 lowest geographical area that we -- that is available, that's  
5 accurate and available, and standardize across the country.

6 Q When did you first develop the standard for the  
7 Commonwealth of Virginia?

8 A First developed that in 2002.

9 Q And when was it last updated?

10 A 2018. This year.

11 Q How was it updated for 2018?

12 A Well, it turns out that IKEA was using this data to vary  
13 their starting wages by where their stores were located so it  
14 would reflect the local cost of living. And they noted that  
15 it had not been updated in some states as regularly, because  
16 we're dependent upon our partners in each state. And so they  
17 paid for updating the standard in 27 states where there's  
18 IKEA stores.

19 Q Would you look at the second document I handed you?

20 A Yes.

21 Q And will you identify that document, please?

22 A That's the Methodology Appendix for The Self-Sufficiency  
23 Standard for Virginia in 2012.

24 MS. PAZANDAK: And, Your Honor, this is in your  
25 notebook behind tab 13.

Pearce - Direct

1 BY MS. PAZANDAK:

2 Q What agency of the Commonwealth of Virginia requested the  
3 2012 calculation?

4 A This was prepared for -- in 2012 for the Virginia  
5 Department of Social Services.

6 Q And is this a fair and accurate copy of the Methodology  
7 Appendix?

8 A Yes, it is. And it specifies our data sources,  
9 assumptions, and our calculation methods for Virginia, which  
10 is standardized but gives us specifics for Virginia.

11 Q Would you identify this next document?

12 A This is a Technical Brief for The Self-Sufficiency  
13 Standard for 2018 for the -- all the standards that were  
14 calculated under the IKEA project.

15 Q And is this a fair and accurate copy of that methodology?

16 A Yes, it is.

17 Q So you were going into this before, but what are these  
18 appendices? What do they show?

19 A They show where our data sources are, what assumptions  
20 are made; basically tells you how we calculated, where we get  
21 the numbers, how we -- the methodology and the sources of the  
22 data.

23 Q Are there any significant differences between the two?

24 A No significant differences. There's -- you know, we do  
25 some fine-tuning.

Pearce - Direct

1       Unlike the poverty standard, which got frozen in the  
2 1960s based on what data that was available then, if we get  
3 data that provides a more accurate way of calculating  
4 something, then we will refine it. But, basically, it's the  
5 same categories and the same sources.

6 Q   Dr. Pearce, do you have an opinion as to whether the  
7 suspension of licenses for failure to pay court debts and  
8 fines disproportionately impacts individuals in Virginia that  
9 do not meet self-sufficiency standards?

10 A   Yes.

11           MS. O'SHEA: I'm going to object to that; that the  
12 basis of that is not in evidence and it's beyond the scope of  
13 her expertise, which is in self-sufficiency, it's not in  
14 legal fields.

15           THE COURT: What was the question again?

16 BY MS. PAZANDAK:

17 Q   Do you have an opinion as to whether the suspension of  
18 licenses for failure to pay court debts and fines  
19 disproportionately impacts individuals in Virginia that do  
20 not meet The Self-Sufficiency Standard?

21 A   Yes.

22           THE COURT: I understand the objection. I'll let  
23 her answer and explain her answer.

24 BY MS. PAZANDAK:

25 Q   Okay. So why don't you tell us your opinion?

Pearce - Direct

1 A My opinion is that it does affect them, because they are  
2 not able to meet their basic needs as it is, so taking away  
3 their driver's licenses obviously makes it impossible to earn  
4 an income to meet their basic needs.

5 Q Okay. And what's the basis of your opinion?

6 A The basis of my opinion is my research on the standard.

7 Q Dr. Pearce, have you reviewed any information related to  
8 Adrainne Johnson?

9 A Yes, I have.

10 Q What have you reviewed?

11 A I've looked at her income, benefits, which provide a  
12 source of resources to meet her basic needs, and compared  
13 these to the standard. So her income and benefits and  
14 expenditures.

15 Q Is there a way to zoom out?

16 Do you have an opinion as to whether Adrainne Johnson  
17 meets The Self-Sufficiency Standard?

18 A No, she does not. Yes, I have an opinion.

19 Q Do you hold that opinion to a reasonable degree of  
20 certainty in your field of expertise?

21 A Yes.

22 Q And what is that opinion?

23 A She does not. She's not able to meet her basic needs,  
24 given her income and benefits.

25 Q And what is the basis of that opinion?

Pearce - Direct

1 A From reviewing, again, her income, benefits, and  
2 expenditures versus The Self-Sufficiency Standard.

3 Q Okay. And if you'll turn to the fourth document I handed  
4 you, which is also up here on the screen, can you please  
5 identify that document?

6 A That's a demonstrative for Adrainne Johnson.

7 Q And can you explain what that demonstrative shows?

8 A So this compares the amounts in The Self-Sufficiency  
9 Standard for housing and food to what she spends for those  
10 standards, and then shows what the shortfall for the surplus  
11 is for each of these items.

12 So, for example, for housing, we used the fair market  
13 rents, which is what the Department of Housing and Urban  
14 Development has determined is the minimum you need to spend  
15 to meet, minimally meet -- you know, adequately meet your  
16 need for housing. So this includes housing. This includes  
17 both the rent and utilities.

18 So in Charlottesville, Virginia, you should be spending  
19 \$1,179.

20 She's only spending \$200. She's doubled-upped. And she  
21 didn't quite say it, but basically she's sharing housing,  
22 where she and her two children share a room, and they have a  
23 shared kitchen and shared bath, and it's not acceptable, you  
24 know, living conditions. It's both overcrowded and not  
25 clean.

Pearce - Direct

1       And so she's way spending under what she needs to meet  
2 her basic needs. I mean, she doesn't have any extra income  
3 for other things, because she's not even meeting what she  
4 should be, what the government thinks, because the fair  
5 market rents are established for people receiving housing  
6 assistance. So this is what low-income people who do not  
7 have enough income to meet their housing need, this is the  
8 level at which the rent, including -- and plus utilities,  
9 they get from HUD.

10      And the same thing for food. So for food, again, this is  
11 what the USDA gives people who are getting stamps, getting  
12 the full benefit from food stamps, for people who don't have  
13 any income to pay for their food stamps. So, again, it's the  
14 minimum.

15      And it only covers groceries. It doesn't cover a pizza  
16 or lattes. It's a very bare minimum of what you need to meet  
17 your food needs if you have an adult, a school-aged child,  
18 and a teenager. This is where age makes a difference.

19      She's spending less than half that, so clearly she is not  
20 able to meet her family's nutrition needs on her income. So  
21 even just, you know, these two things aren't enough to  
22 meet -- you know, these two items in the basic needs budget  
23 is less than -- is more than her income.

24      MS. O'SHEA: I'm going to object to that last bit of  
25 testimony of finding that somebody is not getting sufficient

Pearce - Direct

1 nutrition based on the amount of money that's spent on  
2 groceries. I certainly think the doctor can testify about  
3 what people normally spend on groceries versus what was spent  
4 on groceries here, but unless she has personal knowledge of  
5 what's in those grocery bags when they come home from the  
6 grocery store, I think that's beyond the scope of her  
7 knowledge and expertise.

8 THE WITNESS: This is what the United States  
9 Department of Agriculture has determined is the minimum you  
10 need to meet your nutritional needs, looking at all, you  
11 know, the vitamins and minerals and protein that we need.  
12 And they do a market basket; they determine what it costs to  
13 meet those needs. One survey found that, using this budget,  
14 only about 30 percent of people were able to meet their basic  
15 needs.

16 THE COURT: With that information, thank you, that's  
17 sufficient. The Court can decide whether it's nutritious or  
18 not.

19 BY MS. PAZANDAK:

20 Q If you'll turn to the next page in your demonstrative,  
21 Dr. Pearce, can you tell us what this chart shows?

22 A This is just a way of showing graphically what I've been  
23 saying in terms of numbers.

24 So she's only spending about 17 percent of what HUD  
25 thinks you need to spend to minimally meet your needs for

Pearce - Direct

1 housing. She's clearly spending a great deal less than that.  
2 And she should spend more than that. If she had more  
3 dollars, she would spend more to better meet her --

4 MS. O'SHEA: I object to that as speculative.

5 THE COURT: Go ahead.

6 BY MS. PAZANDAK:

7 Q And can you tell us what this final demonstrative shows,  
8 Dr. Pearce?

9 A Again, it's the food. So she's spending 39 percent of  
10 what the USDA food budget says should be spent to meet your  
11 nutritional needs for this size and age of children. It says  
12 family and age of children.

13 Q Dr. Pearce, have you been given information about the  
14 other four named plaintiffs in this matter?

15 A Yes, I have.

16 Q And what type of information have you been given?

17 A Similar information on their income, expenditures, and  
18 benefits.

19 Q Do you have an opinion as to whether any of those meet  
20 The Self-Sufficiency Standard?

21 A Yes, I do.

22 Q And do you hold that opinion to a reasonable degree of  
23 certainty in your field of expertise?

24 A Yes.

25 Q And what is that opinion?

Pearce - Direct

1 A All of them are well below The Self-Sufficiency Standard.  
2 They are not able, with their current income, to meet their  
3 basic needs. So, basically, asking them to pay court fines  
4 is taking milk away from babies.

5 Q And do you have an opinion as to whether any of the named  
6 plaintiffs can afford a payment plan to get their license  
7 back and still meet The Self-Sufficiency Standard for their  
8 locality?

9 A I can say that they would not be able to meet their basic  
10 needs using The Self-Sufficiency Standard as a measure of  
11 that.

12 Q And if they were put on a payment plan, what would that  
13 mean for them and their families?

14 A I assume it would mean being deeper in the hole and less  
15 able to meet their basic needs.

16 MS. O'SHEA: I'm going to object to that as  
17 speculative as well.

18 THE COURT: Okay. Well, they don't have enough  
19 money now and, of course, if you take what little they've got  
20 from them, it's pretty obvious, I mean.

21 MS. O'SHEA: We don't need expert testimony, Your  
22 Honor, frankly.

23 THE COURT: What I'm saying is it's not prejudicial.  
24 It's just stating. The facts she is telling the Court are  
25 sufficient for the Court to reach the same conclusion as

Pearce - Cross

1 she's reaching. So her information is helpful to the Court.  
2 Her opinion, no one would disagree with it, with all these  
3 facts, I wouldn't think.

4 MS. O'SHEA: I was objecting to the extent that she  
5 was opining as to some contingencies that may depend on facts  
6 and circumstances that aren't before the Court.

7 THE COURT: All right.

8 MS. PAZANDAK: That's our final question. Thank  
9 you, Dr. Pearce.

10 THE COURT: Okay. You may cross. Do you want to  
11 cross?

12 MS. O'SHEA: Yes, sir.

13 THE COURT: Okay.

14 CROSS-EXAMINATION

15 BY MS. O'SHEA:

16 Q Good afternoon. Is it Pearce?

17 A Yes.

18 Q Dr. Pearce?

19 A Yes. Thank you.

20 Q Okay. I'm just going to ask you just a few follow-up  
21 questions with respect to the information that underlies the  
22 opinions that you've arrived at for this case.

23 All right?

24 A Okay.

25 Q You testified that you were given information about

Pearce - Cross

1 Ms. Johnson and her finances and circumstances, correct?

2 A Yes.

3 Q How did you get that information?

4 A By computer. I mean, I'm not sure what you mean, how did  
5 I get that information.

6 Q Was it communicated to you from Ms. Johnson or from  
7 Ms. Johnson's counsel?

8 A Both.

9 Q Were you given financial statements and invoices and W-2s  
10 and receipts, or were you just kind of given a different type  
11 of information?

12 A I wasn't given documents, if you're asking that.

13 Q So you weren't given documents. So then were you told,  
14 this is what Ms. Johnson's income is?

15 A Yes.

16 Q Were you told what her source of income was, where she  
17 was getting the income from?

18 A Yes.

19 Q So you were given a figure and you were given a source,  
20 correct?

21 A Yes.

22 Q Okay.

23 A I mean, not a specific employer or anything like that.

24 Q I understand. So you were told that she was working for  
25 a certain hourly wage and a certain number of hours per week,

Pearce - Cross

1 right?

2 A Right.

3 Q And is that the figure that you used to come up with the  
4 current income of \$1,399 per month?

5 A Yes. That's her new job.

6 Q Right. Now, with respect to expenditures, a similar  
7 question. Were you just told, this is what her monthly  
8 expenditures are for groceries?

9 A Yes.

10 Q So that was reported to you. Did that come from  
11 Ms. Johnson herself, or did that come through her attorney?

12 A It came through her attorney.

13 Q Did you ever speak with or interview Ms. Johnson?

14 A Yes.

15 Q Was that in person or over the phone?

16 A Both.

17 Q And have you been to the residence where she's currently  
18 living?

19 A No.

20 Q Did you interview her children?

21 A No, I did not.

22 Q Did you speak to her children in school about whether or  
23 not they obtain, like, free lunches through school programs?

24 A No, I did not.

25 Q Did you speak with her -- the people that she lives with?

Pearce - Cross

1 A No, I did not.

2 Q Okay. So you have this self-reported here expenditure of  
3 \$320 for groceries per month, correct?

4 A Yes.

5 Q Did you inquire as to whether or not she had any other  
6 fixed expenditures?

7 A Yes.

8 Q And what were those?

9 A She has child support, the rent. I mean -- I mean, to  
10 some extent food is a fixed expenditure, a necessary  
11 expenditure. I don't know what you mean exactly by "fixed."

12 Q Like a cell phone bill, for example.

13 A Yes, I did use a telephone bill, too.

14 Q So there's a phone bill, rent, groceries. Did you ask  
15 her about her eating habits, how often they eat out or  
16 ordered food out?

17 A No.

18 Q Did you ask about things like if they go to the movies?

19 A No.

20 Q Or have entertainment expenses?

21 A No.

22 Q So based on the numbers that were given to you, you  
23 calculated that she had an income of \$1,399 a month, right?  
24 Correct?

25 A Correct.

Pearce - Cross

1 Q Okay. And then from that, with that starting figure, you  
2 take out the \$200 in rent, right?

3 A Yes.

4 Q Okay. And then the \$320 that she reported in groceries,  
5 right?

6 A Yes.

7 Q And the math on that, if you take approximately \$1,400  
8 and you subtract \$520, that leaves you with what? Sorry.  
9 I'm trying to do the math here.

10 \$880, right? Correct?

11 A From 1994, 520?

12 Q No. I'm saying, she reported an income of \$1,399 a  
13 month, right?

14 A Oh, okay.

15 Q And then if you take that as her budget, and you take out  
16 the \$200 in rent, and you take out the \$320 in groceries, you  
17 are left with \$880, right?

18 A Yes.

19 Q All right. And from that \$880, then out of that comes  
20 the child support payment, correct?

21 A Yes.

22 Q And then the only other fixed budget item that she  
23 reported was a \$100 phone bill, right?

24 A There were several others, actually. I think we have  
25 some other -- there were several other costs, I think. There

Pearce - Cross

1 was a Y membership and a number of other costs.

2 Q A wine membership?

3 A I can't remember exactly.

4 Q Oh, you said "Y," like YMCA. I thought you said "wine,"  
5 like alcohol.

6 A No, I said "Y," YMCA. I'm sorry.

7 Q Thank you. I misheard. All right. Thank you.

8 So other than the YMCA membership, can you remember any  
9 other specific recurring monthly costs?

10 A Well, of course she has transportation.

11 Q Like a bus pass?

12 A Well, she can't always get places by bus, so she would  
13 have to take other things as well if she's going to get to --  
14 you know, get to her employment.

15 Q Were you in the courtroom when she testified before?

16 A Yeah.

17 Q You heard her testify?

18 A She also takes a bus.

19 Q Correct.

20 A Yeah.

21 Q So do you know how much a bus pass is in the City of  
22 Charlottesville?

23 A I think it's \$20.

24 Q Per month or per year?

25 A Per month.

Pearce - Cross

1 Q So if she has a bus pass, that's an additional \$20,  
2 correct?

3 A Right.

4 Q Okay. So would you agree, then, that taking out these  
5 other sorts of fixed sources, that it appears that she still  
6 has around 400 or \$500 in cash every month left over of the  
7 amount that she earns?

8 A Yes.

9 Q Now, you testified before, your exact language was, if I  
10 recall correctly, that it's impossible for people who are  
11 below the self-sufficiency threshold to pay back their fines  
12 and costs.

13 Was that your testimony?

14 A I said that if they did so, they would be taking it out  
15 from meeting their basic needs.

16 So if she has additional, you know, income now that she  
17 has a current job, she should be spending that towards her  
18 housing and towards her food, because she's not spending  
19 enough now to meet her nutritional needs or to meet her  
20 housing needs. Living in one room with two children is not  
21 meeting a basic need.

22 Q Would you agree that if you have a house, a roof over  
23 your head, heat, water, aren't those life's basic  
24 necessities?

25 A Not if you're living in housing that's overcrowded. It

Pearce - Cross

1 affects your health. It affects your children's. I mean, by  
2 basic needs, they have no more than two people in a bedroom,  
3 and children and adults do not share a bedroom. That's a  
4 basic rule for HUD in every housing, public housing, that  
5 they subsidize, and not to be sharing a housing unit that was  
6 meant for one family with two families.

7 Q Would you agree that everyone's ability to pay certain  
8 recurring expenses is going to be dependent upon their own  
9 unique factual circumstances?

10 A No. I think the whole point of developing something like  
11 The Self-Sufficiency Standard is to say that, yes, you have  
12 to meet some arbitrary decisions, but you do come up with  
13 some numbers that say, this is the minimum people need to  
14 meet their basic needs.

15 And the government, in fact, does that when they do that  
16 for housing assistance, when they do it for childcare  
17 assistance, when they do it for food assistance.

18 Q So I understand you've got a general rule. The general  
19 rule is, this is the amount of money people should have in  
20 order to meet their basic needs. I get that that's basically  
21 what your standard says.

22 But what I'm saying is: Don't you also have to look at  
23 the individual circumstances of the person to decide whether  
24 or not their needs are being met and whether or not they  
25 might have extra income that could go to pay things like

## Pearce - Redirect

1 their court-ordered fines and costs?

2 A It's not extra income. It's income that is now  
3 available, maybe, to begin to meet her basic needs.

4 But you can't count on the fact that people will find  
5 wonderful housing for \$200 a month. Maybe a few people  
6 could, but you can't count on that. And when you look at  
7 what people can afford, you have to give some credence to  
8 what basically government agencies have said is necessary to  
9 meet your basic needs.

10 Q So, then, your testimony is basically, regardless, some  
11 people might get lucky?

12 A You can't count on luck.

13 Q You can't count on luck, but some people do?

14 A Right.

15 Q So if you're got somebody and you're trying to assess  
16 whether or not they have enough money to meet their needs,  
17 don't you need to look at things like that that are unique to  
18 each circumstance?

19 A I think that becomes essentially arbitrary.

20 MS. O'SHEA: All right. I don't have any other  
21 questions. Thank you, Judge.

22 THE COURT: Redirect?

23 REDIRECT EXAMINATION

24 BY MS. PAZANDAK:

25 Q Dr. Pearce, just a couple more questions. Do you believe

## Pearce - Redirect

1 that Adrainne Johnson got lucky with her housing situation?

2 A Not at all.

3 That's crooked.

4 Q Sorry.

5 Can you identify the document up on the screen?

6 A That is a document looking at Adrainne Johnson's expenses  
7 in all different areas and compared to the standard, and  
8 again looking at benefits.

9 Q So before we were just looking at an example?

10 A Yeah. Just a couple of the items, yeah.

11 Q A couple items?

12 A Because those items alone are, you know --

13 Q So certainly, although you couldn't recall all them from  
14 memory, Ms. Johnson has a number of other expenses --

15 A Right.

16 Q -- is that correct?

17 A Right.

18 Q And in your opinion, is Ms. Johnson meeting her family's  
19 basic needs with the income that she has now?

20 A No.

21 Q Are any of the named plaintiffs?

22 A No.

23 MS. PAZANDAK: That's all.

24 THE COURT: Okay. Let's take about a ten-minute  
25 recess.

Peterson - Direct

1 MR. BLANK: Thank you, Your Honor.

2 THE MARSHAL: All rise.

3 (Recess, 3:36 to 3:47 p.m.)

4 THE COURT: All right.

5 MR. BLANK: Your Honor, we're going to ask Mr. Abel  
6 to call Mr. Peterson.

7 Judge, just to make it clear for the record, because  
8 speaking to the court reporter, my expectation at the end of  
9 our presentation is to put in our notebook as one exhibit to  
10 make it easy on the court reporter. I understand from the  
11 Commonwealth they're okay with that. The only exception is,  
12 I didn't have Ms. Adrainne Johnson, the last one. We'll put  
13 that in as Exhibit 2.

14 So the whole notebook will be 1, with everything.  
15 We'll put the additional demonstrative in as Exhibit 2.

16 THE COURT: Thank you.

17 MR. BLANK: Thank you.

18 MR. ABEL: Your Honor, plaintiffs will call  
19 Dr. Steven Peterson.

20 STEVEN PETERSON, Ph.D., CALLED BY THE PLAINTIFFS, SWORN  
21 DIRECT EXAMINATION

22 BY MR. ABEL:

23 Q Good afternoon. Would you state your name for the  
24 record?

25 A My name is Steven Robert Peterson.

Peterson - Direct

1 Q Where do you live?

2 A I live in Arlington, Massachusetts.

3 Q Where are you currently employed?

4 A I work for Compass Lexicon.

5 Q What is Compass Lexicon?

6 A Compass Lexicon is an economic consulting firm that  
7 specializes in finance and competition issues, and so we  
8 provide expert testimony and other analysis for law firms,  
9 corporations, and the government.

10 Q What's your title at Compass Lexicon?

11 A I'm an executive vice president.

12 Q How long have you been an executive vice president?

13 A I believe I was promoted to that level in April 2013.

14 Q As an executive vice president, what do your job duties  
15 include?

16 A I serve my clients and do economic studies and provide  
17 expert testimony. I supervise expert testimony that will be  
18 given by others, and write reports, draft reports. And I  
19 share responsibility for managing the Boston office.

20 Q How long have you been employed by Compass Lexicon?

21 A I started working for a predecessor to Compass Lexicon in  
22 1990, while I was still in graduate school.

23 Q Where did you go to college?

24 A I went to the University of California Davis.

25 Q What degree did you receive from them?

Peterson - Direct

1 A I received a bachelor's degree in economics.

2 Q What other degrees do you hold?

3 A In 1992, I received a Ph.D. in economics from Harvard  
4 University.

5 Q Do you teach?

6 A I teach when I have the time, yes.

7 Q Where have you taught?

8 A Well, I taught in graduate school, obviously; and over  
9 the last six or seven years, I've taught at Northeastern  
10 University in Boston.

11 Q What have you taught at Northeastern?

12 A I've taught Principles of Economics, but I more generally  
13 would teach a class called Government and Business, which  
14 covers antitrust, economic regulation, the political economy  
15 of regulation, which is sort of the theory of where  
16 regulations come from economically, and other aspects of  
17 government policy.

18 I also created a course with a colleague called Image  
19 Economics and Policy, which we've taught together there a few  
20 times.

21 Q Within economics, what's your field of expertise?

22 A I'm a microeconomist.

23 Q What is microeconomics?

24 A Well, in general, microeconomics is the study of the  
25 incentives that people face and how they respond to them.

Peterson - Direct

1 And I guess that would cover people and firms.

2 Q What speciality do you have within microeconomics?

3 A Well, my work at Compass Lexicon involves using data,  
4 typically large amounts of data, to understand markets and  
5 the incentives that firms face.

6 Q Do you work with large datasets as part of that work?

7 A Frequently we do, yes. For example, I'm currently  
8 working with data for an airline matter. One client -- one  
9 party has 200 million tickets and 500 million individual  
10 flight coupons, and so we're working on that data. Other  
11 datasets have, you know, more or less.

12 Q As part of your work at Compass Lexicon, do you routinely  
13 make economic inferences based on those large datasets?

14 A Yes. We try to characterize markets and apply economic  
15 principles to what we see to make economic inferences. We  
16 also test economic inferences and, you know, validate them  
17 with the data.

18 Q Have you published in your field?

19 A I have.

20 Q What --

21 MS. O'SHEA: I'm sorry, I didn't mean to cut you  
22 off. We're happy to stipulate that he's an expert in the  
23 field of economics, with a subspecialty in microeconomics, if  
24 that will facilitate matters.

25 THE COURT: All right.

Peterson - Direct

1 MR. ABEL: For purposes of the record, Your Honor,  
2 I'll just show Dr. Peterson.

3 BY MR. ABEL:

4 Q Do you recognize that document?

5 A That's my curriculum vitae, yes.

6 MR. ABEL: For the Court's reference, that's at tab  
7 14A within the binder.

8 THE COURT: All right.

9 BY MR. ABEL:

10 Q Dr. Peterson, what were you asked to address today?

11 A I was asked to address two primary questions, and the  
12 first is whether the loss of a driver's license for failure  
13 to pay court fines would have a negative impact on an  
14 individual's ability to obtain work and maintain employment.

15 And I was also asked to address the question of whether  
16 suspending licenses for failure to pay would  
17 disproportionately affect poor people rather than more  
18 affluent people.

19 Q In answering that first question, what research did you  
20 do to prepare to answer it?

21 A Well, the first thing I wanted to do was determine the  
22 importance of being a legal driver for employment, and so I  
23 think we have some data from the Department of  
24 Transportation --

25 Q Sure.

Peterson - Direct

1 A -- that shows that.

2 Q Based on your review and that research, did you create a  
3 series of demonstratives for the Court?

4 A Yes, I did. My staff created them under my direction.

5 MR. ABEL: And, Your Honor, these demonstratives,  
6 for the record, begin at tab 14B within the binder.

7 BY MR. ABEL:

8 Q Dr. Peterson, is this the first of those demonstratives?

9 A It is.

10 Q And what does this demonstrative show?

11 A This shows the different categories of work, you know,  
12 the type of jobs that require driving. And for our purposes  
13 here, in general, all jobs are reported to require, on  
14 average, 30 -- it shows that, of all jobs, 30 percent require  
15 some type of driving.

16 MR. ABEL: Your Honor, if I can approach the  
17 witness, just because it seems like we might be having some  
18 zoom issues, just so I can hand him up a copy of the  
19 demonstrative so he can view it in full?

20 THE COURT: All right.

21 THE WITNESS: Thank you.

22 BY MR. ABEL:

23 Q Dr. Peterson, did you and your team create a second  
24 demonstrative for the Court?

25 A Yes, we did.

Peterson - Direct

1 Q Is this that demonstrative?

2 A It is.

3 Q What does this demonstrative show?

4 A Well, this just shows that most people use private  
5 vehicles in order to commute to work nationally and in  
6 Virginia. The red bars represent Virginia.

7 So over 75 percent drive to work alone, and not quite  
8 10 percent carpool. And, notably, relatively small numbers  
9 of people use public transportation or walk or use other  
10 transportation.

11 Q So in answering that first question, how did this  
12 information help you answer that?

13 A Well, what it shows is that the usual experience of  
14 people is that a car is useful for getting to work. And we  
15 heard today what is economic common sense, I suppose; that if  
16 a job is distant from a bus line or something like that,  
17 there will be jobs that people cannot readily reach.

18 And so here we see a car is important for a lot of people  
19 to reach jobs; and the more jobs you can reach, the better  
20 your employment opportunities are. And so this gives support  
21 for that economic conclusion.

22 MR. ABEL: Your Honor, for the record, I'll state  
23 that a study from which this demonstrative comes is attached  
24 as Exhibit 12 to the memorandum in support of the motion for  
25 preliminary injunction?

Peterson - Direct

1 THE COURT: All right.

2 BY MR. ABEL:

3 Q Dr. Peterson, in addition to the data and the figures  
4 we've discussed already, did you review any studies to answer  
5 that first question?

6 A I reviewed a number of studies. And we have a third  
7 demonstrative, I think, where I extracted a quote from a  
8 study by the National Center for State Courts.

9 Q Is this that demonstrative?

10 A It is.

11 Q What does this demonstrative show?

12 A Well, this study would support the previous two  
13 conclusions: that jobs require driving and that driving makes  
14 more jobs accessible for people.

15 But it also reached this additional conclusion, and it  
16 basically points out -- the last phrase here is that, "Some  
17 employers view having a valid driver's license as an  
18 indicator of reliability."

19 So a valid driver's license is, in a sense, a screen for  
20 employability with at least some employers, and so not having  
21 a valid driver's license could hurt the opportunity to obtain  
22 a job, even if you can reach it.

23 MR. ABEL: Your Honor, for the record, I'll state  
24 that the Center for State Courts study is attached in full to  
25 the memorandum in support of the motion for the preliminary

Peterson - Direct

1 injunction at Exhibit 17.

2 THE COURT: Thank you.

3 BY MR. ABEL:

4 Q Dr. Peterson, in addition to this study, did you review  
5 any other studies?

6 A There is one other study that I found interesting and  
7 supportive of what we have already talked about, and that is  
8 a study from the Voorhees Center for Transportation at  
9 Rutgers University that was done in conjunction with the New  
10 Jersey Department of Transportation.

11 Q What did that study show?

12 A Well, that study used a number of different methodologies  
13 to address the issue of what happens when you suspend  
14 licenses for failure to pay. And one thing that they did was  
15 just ask people who had their licenses suspended, and what  
16 they found was that between 40 and 45 percent of people with  
17 suspended licenses reported losing their jobs. And  
18 approximately 45 percent, as I recall, of the people who lost  
19 their jobs reported having some difficulty in finding another  
20 job or reported not being able to find another job.

21 And finally, they report that, even for the people who  
22 found another job, 88 percent experienced a reduction in  
23 income.

24 So that shows that, you know, the immediate effect for a  
25 large number of people was a reduction in income. The

Peterson - Direct

1 immediate effect of losing a driver's license is a reduction  
2 of income. And, of course, you know, for others, if they  
3 have a change in circumstance or something, then their  
4 flexibility to change jobs is affected as well.

5 MR. ABEL: Your Honor --

6 THE WITNESS: I should say successfully change jobs.

7 MR. ABEL: Your Honor, for the record, I'll state  
8 that the Voorhees study is attached in full in the memorandum  
9 in support of the motion for preliminary injunction as  
10 Exhibit 18.

11 THE COURT: Thank you.

12 BY MR. ABEL:

13 Q Dr. Peterson, you heard Ms. Johnson testify here today;  
14 is that correct?

15 A That's right.

16 Q Before you testified here today, were you able to speak  
17 to any of the other named plaintiffs in this case?

18 A I was.

19 Q Do you remember which named plaintiffs you spoke with?

20 A Let's see. Ms. Abrams. Is that --

21 Q Adams.

22 A Adams. I'm sorry. And Brianna --

23 Q Does Morgan sound right?

24 A Morgan.

25 Q Based on -- were you able to talk to Ms. Johnson before

Peterson - Direct

1 her testimony here today?

2 A I was.

3 Q Based on Ms. Johnson's testimony here today, as well as  
4 the conversations you had with other named plaintiffs before  
5 your testimony here today, what did those conversations and  
6 that testimony do to help you to answer that question, the  
7 first question you were asked?

8 A Well, we heard directly from Ms. Johnson that she lost a  
9 job because of an inability to reach work. So that's  
10 consistent with what we're finding in the studies here and  
11 the evidence showing the importance of driving as related to  
12 employability and reaching work.

13 We also heard that she would like to get jobs that  
14 require driving, and even has an opportunity to raise her  
15 income if she could drive and take receipts to the bank as a  
16 manager.

17 So her experiences are very consistent with what we're  
18 hearing here. And other people basically reported continuing  
19 to drive because they had to support their families, and so  
20 driving was an important aspect of their being able to  
21 maintain employment and support their families.

22 Q Dr. Peterson, based on your review of the data, the  
23 information that you've shown the Court so far in the  
24 demonstratives, and in listening to the testimony of  
25 Ms. Johnson, as well as the conversations you had with the

Peterson - Direct

1 other named plaintiffs before today, were you able to form an  
2 opinion as to the first question you were asked to answer  
3 here today?

4 A I was.

5 Q And were you able to form that opinion within a  
6 reasonable degree of certainty in your field of expertise?

7 A Yes.

8 Q And what is that opinion?

9 A My opinion is that the loss of a driver's license for  
10 failure to pay court fines adversely affects people's ability  
11 to gain employment and maintain employment, and that the loss  
12 of a driver's license can readily lead to a reduction in  
13 income from the loss of employment or from having to take a  
14 less desirable job.

15 Q Dr. Peterson, I want to turn to that second question you  
16 were asked to answer here today.

17 In addressing that second question, did you seek out any  
18 information?

19 A I did.

20 Q What information did you seek out?

21 A Well, first I wanted to understand the scale of the  
22 problem, and so I sought out information on the number of  
23 people with suspended driver's licenses in the state of  
24 Virginia and, in particular, the number of people with  
25 suspended driver's licenses for failure to pay court fines

Peterson - Direct

1 and costs.

2 Q Were you able to find that information?

3 A I was.

4 Q Where were you able to find that information?

5 A It was contained in an e-mail that I understand to be  
6 part of this case.

7 Q Does this look like that e-mail?

8 A It does.

9 Q What does this e-mail show?

10 A Well, what's important to me is what's blown up and  
11 highlighted, and that's that there are basically 978,000  
12 people in Virginia with suspended licenses, and 647,000 or  
13 648,000 of those are suspended only as a result not paying  
14 fines and costs.

15 Q Did you review any other information in seeking to answer  
16 the second question?

17 A I did.

18 Q What information is that?

19 A I was able to obtain information showing the results of  
20 court cases in Virginia over the period 2010 through 2017.

21 Q Can you describe that dataset in more detail to the  
22 Court?

23 A Sure. As I understand it, the state of Virginia posts  
24 the results of its hearings and court cases and citations on  
25 the internet, with people's names and some identifying

Peterson - Direct

1 information, and this is present on different systems across  
2 the Commonwealth.

3 A computer scientist named Ben Schoenfeld wrote software  
4 to basically scrape all of that information off of all of the  
5 different websites and pull it together into a common  
6 database.

7 And what's notable about this is it has identifying  
8 information, so we can match records. And it shows what the  
9 charge was. It shows hearing dates. It shows the results of  
10 the hearing, what fines were assessed, whether they've been  
11 paid, what the payment date is, jail days that have been  
12 sentenced and suspended, and so forth.

13 So we have, basically, a row of information for each  
14 charge.

15 Q And how many individual pieces of data are included in  
16 Mr. Schoenfeld's dataset?

17 A For the years I looked at, there were approximately  
18 14 million records.

19 Q Have you spoken to Mr. Schoenfeld about this data?

20 A I have.

21 Q Did you and your team create a series of demonstratives  
22 for the Court based on your review of that data?

23 A I have.

24 Q Is this the first of those demonstratives?

25 A It is.

Peterson - Direct

1 Q What does this demonstrative show?

2 A This is a subset of the data for Adrainne Johnson. So  
3 this shows, you know, the charge, as written in the data.  
4 There's a free-form field that describes the charge. There's  
5 a code section, offense date, file date, and the costs and  
6 the fines that were imposed. There would also be jail time  
7 and other information in each record.

8 Q Did you prepare another demonstrative for the court based  
9 on your review of Mr. Schoenfeld's data?

10 A Yes. I was interested in understanding, given that there  
11 are, call it 650,000 or so people who are suspended with --  
12 with a suspended license for failure to pay, how often are  
13 they entering the system and being charged with driving with  
14 a license suspended?

15 And so I was able to calculate, basically just count,  
16 those cases in Mr. Schoenfeld's dataset, or in our version of  
17 it.

18 And what I should say is these are DWLS cases related to  
19 the failure to pay. We can observe license suspensions in  
20 the data as well. And so for offense dates that would fall  
21 inside of a license suspension, we didn't count those.

22 Q Is this that demonstrative?

23 A It is.

24 Q What does this demonstrative show?

25 A It shows the prevalence of these DWLS cases for failure

Peterson - Direct

1 to pay fines and costs. And between 2015 and 2017, there  
2 have been roughly 50 to 54,000 DWLS cases per year, affecting  
3 40 to 44,000 individuals a year.

4 Q In addition to DWLS cases, were you able to see other  
5 offenses appear in Mr. Schoenfeld's data?

6 A Yes.

7 Q Being able to see other offenses other than DWLS, what  
8 did that allow you do?

9 A Well, it allowed us to make a comparison of payment rates  
10 for DWLS. And we chose speeding as what we thought would be  
11 sort of an equal-opportunity offense that would be committed  
12 by, you know, affluent and less affluent people together.

13 MR. ABEL: Your Honor, I'll just mention that the  
14 demonstrative shown before, there was a change in the order,  
15 so I just wanted to call that out.

16 BY MR. ABEL:

17 Q Based on that comparison that you and your team did,  
18 Dr. Peterson, did you create another demonstrative for the  
19 Court?

20 A Yes.

21 Q Is that this demonstrative?

22 A It is.

23 Q What does this demonstrative show?

24 A This demonstrative shows the share of DWLS fines that  
25 were paid within 60 days and the share of speeding fines that

Peterson - Direct

1 were paid within 60 days. So we see a dramatic difference,  
2 where over 85 percent of speeding fines are paid off in 60  
3 days, but over these years, only a little over 8 to  
4 10 percent of DWLS charges or fines were paid in 60 days.

5 Q What did that disparity tell you?

6 A Well, this is exactly the results you would expect if the  
7 people who are suspended for failure to pay also have trouble  
8 paying the fine related to a DWLS charge.

9 I mean, I suppose this isn't surprising, because if their  
10 license was suspended for a failure to pay previous fines,  
11 you know, it's not surprising that this fine wouldn't be paid  
12 as well, at a high rate.

13 Q Did you create another demonstrative for the Court based  
14 on your review of Mr. Schoenfeld's data?

15 A I did.

16 Q Is this that demonstrative?

17 A It is.

18 Q What does this demonstrative show?

19 A This demonstrative answers another question that I had  
20 with regard to answering the second question about the focus  
21 of suspensions on -- the effect of suspensions on poor  
22 people.

23 And so I wanted to understand if, you know, people are  
24 treading water and paying off fines while they're getting  
25 DWLS offenses, as we're sampling some of these people with

Peterson - Direct

1 suspended licenses, or if they're going deeper into debt.

2 So the way we did that was we looked in 2016, and we  
3 chose 2016 because it was late in the database and -- but  
4 likely to have complete data. And that gave us a history, a  
5 potential history, for each individual back through 2010,  
6 which is the first year that we downloaded. And we looked in  
7 2016 for people who, in 2016, were having their first DWLS  
8 offense, and we found that they had \$709 of unpaid court fees  
9 and fines and debt at the time of their DWLS.

10 For people having their second DWLS in 2016, their  
11 outstanding debt was \$982.

12 And for the third DWLS, for people with the third in  
13 2016, they had accumulated nearly \$1,400 worth of debt.

14 And then for people with four or more in 2016, we see  
15 over \$2,000 worth of debt, nearly \$2,200 worth of debt.

16 My conclusion from this is that there are people here  
17 who, you know, are continuing to drive and are falling  
18 further behind. They're not able -- you know, they are not  
19 paying off their debts to the court.

20 Q Did you create another demonstrative for the Court based  
21 on your review of Mr. Schoenfeld's data?

22 A I did. I wanted to understand, you know, what the  
23 incentives were to pay off this debt, particularly for this  
24 group of people who were driving. And I understand that,  
25 with a third DWLS offense, there's a mandatory jail sentence.

Peterson - Direct

1 And so I -- I was able to look at DWLS cases that resulted in  
2 jail time, and we find there are about 9,600 to 11,500 of  
3 those in 2017 to 2015 where people were getting 23 to 26 days  
4 of jail. And I show the total jail days here.

5 And I should just note, we don't observe jail time  
6 served. What we observe in this dataset is sentenced jail  
7 time and less -- we subtracted out suspended jail time. So  
8 that's what's shown here.

9 Q Dr. Peterson, based on everything we've discussed here  
10 today, including the studies and data contained in the  
11 demonstratives you've shown the Court, were you able to form  
12 an opinion as to question number two you were asked?

13 A I was.

14 Q Were you able to form that opinion within a reasonable  
15 degree of certainty in your field of expertise?

16 A Yes.

17 Q What is that opinion?

18 A That opinion -- well, I think it's important to recognize  
19 how all this data fits together in reaching that opinion.

20 So going back to the beginning, what we observed is that  
21 the loss of a driver's license hurts people's income, and so  
22 you would expect that people would pay, you know, their  
23 traffic fines and things like that rather than suffer the  
24 income from the loss of a license.

25 And, of course, for those who continue to drive, we see

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1 that they are at risk of being cited for driving with a  
2 suspended license. And that's a path that people really  
3 shouldn't want to go down, because it ultimately ends up with  
4 jail time.

5 And upon going to jail in Virginia and being released, I  
6 understand that people's fines are not extinguished. So  
7 there is no benefit to going to jail. So we don't even have  
8 to assess whether there are people who are going to jail as a  
9 way to extinguish court debt.

10 So what we have to conclude is that suspending licenses  
11 for failure to pay is affecting poor people, because the  
12 economic incentives are to pay the debt, if you can. And, of  
13 course, that's consistent with the incentives that are built  
14 into the sanction of not paying debt.

15 Suspending a driver's license is supposed to be a strong  
16 incentive to pay that debt; and for the people who don't  
17 respond to that incentive, the economic conclusion is that  
18 they're going to have difficulty paying that debt or  
19 sustaining a payment plan, or something like that.

20 Q Dr. Peterson, I want to draw your attention first back to  
21 demonstrative 8, the data contained there, and then to  
22 demonstrative 9, jail time.

23 Looking at those two numbers together, what is that able  
24 to tell you?

25 A Well, for me, you know, people going to jail are going to

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1 jail for relatively small amounts of money, you know, if  
2 \$1,300 is a small amount of money.

3 Now, if you're making \$1,399 a month, \$1,370 is not a  
4 small amount of money. But for, you know, people working in  
5 an office or something like that, executive assistants or  
6 whatever, I think that that is an amount of money that you  
7 would not expect someone to go to jail over.

8 Q Dr. Peterson, you heard Ms. Johnson testify here today?

9 A I did.

10 Q You heard her say that after her second violation, or  
11 being pulled over the second time for driving with a license  
12 suspended, she didn't drive anymore because she didn't want  
13 to go to jail.

14 Do you remember that?

15 A I do.

16 Q How did that factor into your analysis of the second  
17 question?

18 A Well, it warmed my economist's heart, because it shows  
19 that she was responding to incentives. As the potential  
20 sanction for driving without a license changed, her behavior  
21 changed. So she was behaving in a perfectly rational way.

22 Based on my conversation with her, her primary goal is to  
23 take care of her family, and she can't do that if she goes to  
24 jail. And so driving without a license for a while was one  
25 way to take care of her family and accept some risks, and

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1 when the risks grew, she changed her behavior.

2 And so that supports the economic inferences that we  
3 would draw from that data, or from this data. That is an  
4 example of why the economic inferences we're drawing are  
5 correct.

6 MR. ABEL: Your Honor, no further questions at this  
7 time.

8 CROSS-EXAMINATION

9 BY MS. O'SHEA:

10 Q I just have a couple of follow-up questions about your  
11 underlying data, Dr. Peterson. Is it Peterson?

12 A Yes.

13 Q So referring to your demonstrative number 2, where you  
14 report people across the United States versus people in  
15 Virginia who choose to drive alone in order to go to work,  
16 and the data here, it says 77.4 percent of people in the  
17 United States versus -- I can't tell which number is which --  
18 versus 76.4 choose to drive alone in a car to work?

19 A Virginia is in red.

20 Q Oh. My copy is in black and white.

21 A Oh. I'm sorry.

22 Q So hence the difficulty.

23 A The left-hand bars are Virginia, then.

24 Q Thank you.

25 So my question is: Do you know, the study that these

Peterson - Cross

1 numbers were pulled for, were the people asked if they had to  
2 drive alone to go to work versus they chose to drive alone to  
3 go to work? Was that information included?

4 A I don't know. And I assume that they're choosing,  
5 because, obviously, if you want to round up a carpool, you're  
6 able to do that. So as an economist, that question isn't  
7 really very important to me.

8 This is how -- people want the flexibility. This is  
9 evidence that people, when they are able to, want the  
10 flexibility of driving to work alone, for schedule and  
11 getting to the specific location that they need to go.

12 Q Certainly. I choose to drive to work alone. But I could  
13 get a carpool out of my neighborhood if I wanted to. I'd  
14 still like not to.

15 But so how, if at all, does the difference between people  
16 who choose to drive to work alone versus people who have to  
17 drive to work alone, how does that plug into your ultimate  
18 conclusion that not having a driver's license makes it so  
19 that those people have problems getting to work?

20 A Well, certainly when we see more than three-quarters of  
21 people driving to work alone, it suggests that people may  
22 have trouble getting a carpool.

23 I mean, we heard from Ms. Johnson -- or, actually, we  
24 spoke to her, and she has different start times at work, I  
25 believe. So it can depend on which store she works at. So I

Peterson - Cross

1 think a car -- you know, she would have to find someone with  
2 matching -- a matching schedule. And matching is always  
3 difficult. We know that in economics, right? So carpools  
4 are often difficult, would be difficult to assemble, because  
5 they require a confluence of timing and location for work in  
6 order to not be extremely inconvenient. So I don't see this  
7 as an important consideration.

8 We see what people are choosing to do, and also, we also  
9 see that it largely -- you may not have to drive, but, you  
10 know, private transportation is very important for people  
11 commuting to work.

12 Q So is this -- back to the report that pulled these  
13 figures on the manner in which people choose to go to work,  
14 did it break down at all different localities within the  
15 Commonwealth of Virginia, or did it just lump together  
16 everyone from Virginia?

17 A The data we have is for Virginia as a whole.

18 Q And would you agree that, then, these numbers might vary  
19 depending on from location to location; urban center versus a  
20 rural center, for example?

21 A I would expect there to be some variations, yes.

22 Q Or if you live in a city like Charlottesville that has a  
23 bus line, versus you live in a different city that doesn't  
24 have a bus line, that might be different, too, right?

25 A Well, if there's no bus line, then I expect the public

Peterson - Cross

1 transportation bars would go down.

2 Q Right. So going to my point, then, it's going to vary  
3 from locality to locality within the Commonwealth of  
4 Virginia, right?

5 A Well, these particular results will vary, but the overall  
6 principle, the economic principle that this speaks to, is  
7 that more -- when people are trying to do the best they can,  
8 having a wider range of opportunities allows them to do  
9 better. And so not having a driver's license limits their  
10 range of ability, their opportunity to get to particular  
11 places and to perform certain jobs. And so that's the  
12 overarching conclusion here.

13 Q Fair enough.

14 A And so some of those details -- someone might be lucky  
15 and find a good job in walking distance to work, but that  
16 isn't, you know, the regular experience.

17 Q Depending on location? I mean, if you live in a place  
18 like Alexandria, where there's a ton of things within walking  
19 distance, it might be easier, right?

20 A I guess that might be easier. And the relevance would  
21 depend on the cost of living in downtown Alexandria, I  
22 suppose.

23 Q Certainly.

24 I'm going to ask you now about the dataset that you  
25 reviewed from the -- I think you said through the Virginia

Peterson - Cross

1 courts?

2 A Yes. It was data that was compiled by Ben Schoenfeld.

3 Q All right. And so it references in the graphics that you  
4 put together convictions for driving while on a suspended  
5 license, correct?

6 A Correct.

7 Q Are you aware that, in Virginia, driver's licenses can be  
8 suspended for lots of different reasons?

9 A Yes.

10 Q Right. It's not just failure to pay fines and costs; it  
11 can be for failing to pay child support; it can be because  
12 you have a felony traffic offense, something along those  
13 lines? Right?

14 A Right.

15 Q And are you aware that people in Virginia can have their  
16 driver's licenses suspended -- have multiple suspensions in  
17 effect at the same time?

18 A That's right.

19 Q So you can be suspended for three or four different  
20 reasons all over the same period, right?

21 A Correct.

22 Q Now, you said that you were looking at information from  
23 the website or the dataset that you were given on convictions  
24 for driving while on a suspended license, while your license  
25 is suspended.

Peterson - Cross

1       Now, are you also aware that the code section in Virginia  
2 law for driving on a suspended license doesn't differentiate  
3 between the reasons that you are suspended?

4       A    My data analysis assumes that.

5       Q    So I guess my question is how -- when you're reporting  
6 your data, you're making -- you're reporting, like, this  
7 number of people who are convicted for driving while on a  
8 suspended license. How are you able to make the leap that  
9 the people who were convicted of driving on a suspended  
10 license were suspended solely for failure pay fines and  
11 costs, when the crime that you're charged with doesn't  
12 differentiate between the reason that you're charged? Does  
13 that make sense?

14      A    Yes. I thought I explained this on direct, but the  
15 dataset also shows license suspension times. And so I can  
16 see a DWI where an individual is suspended for 365 days, for  
17 example, and so from the hearing date that we see, if we see  
18 a suspension, a DWLS offense in the year following that  
19 hearing date, we don't count it here.

20           So if we see evidence of a suspension in the data, we can  
21 determine the time when that suspension should be in effect.  
22 And we did not count DWLS charges that took -- that occurred  
23 when another suspension was in effect.

24       Q    Okay. So you lifted out all of the driving while  
25 suspended convictions that you were able to determine

Peterson - Cross

1 corresponded to something other than a suspension for failure  
2 to pay fines and costs?

3 A That's right. So the suspensions -- the DWLS offenses  
4 that we are observing here are those that occurred when there  
5 is no evidence of a suspension for a driving-related reason;  
6 where that is part of your sentence, if you will.

7 Q Understood.

8 I don't think it was available to you, but I'm asking  
9 just to make sure. Things like the average income of the  
10 individuals whose driver's licenses were suspended for  
11 failure to pay fines and costs, that's not data that's  
12 available to you, correct?

13 A No, we do not have data that would allow us to identify  
14 those specific individuals or anything like that. And we  
15 don't -- there's no income information. It's purely data  
16 related to the court proceeding; the fields I described,  
17 generally.

18 MS. O'SHEA: All right. Thank you. I don't have  
19 any other questions.

20 THE WITNESS: Thank you.

21 MR. ABEL: Just a second, Your Honor.

22 That's all we have, Your Honor.

23 THE COURT: Thank you, sir. You may step down.

24 MR. BLANK: Your Honor, I've got three more -- four  
25 more pieces of evidence. Three are going to be very short.

Peterson - Cross

1 One is going to be about ten minutes, but I just need to ask  
2 him one question.

3 I was checking. He has a flight to catch. I didn't  
4 want him to miss his flight.

5 Your Honor, the next piece of evidence that we would  
6 put in are two declarations -- excuse me, two affidavits.

7 One of them is behind tab 15, which is the affidavit of  
8 Robert Fuentes. His résumé is attached, as is one of his  
9 studies.

10 The second affidavit is of Jon Carnegie, with his  
11 résumé; the AAMVA Best Practices Guide to Reducing Suspended  
12 Licenses; and an AAMVA video, which I will play in a second.

13 Just to summarize for Your Honor, but you can read  
14 the affidavits, Mr. Fuentes puts in his affidavit that:  
15 Virginia has limited public transportation. 87 percent of  
16 Virginians travel to work by car. Lack of public  
17 transportation and license cuts off job opportunities for  
18 low-income individuals. And Virginia Code Section 46.2-395  
19 deprives workers of economic opportunities. That's a general  
20 synopsis of it.

21 For Mr. Carnegie, his affidavit testifies that  
22 suspending driver's licenses for failure to pay court debt  
23 potentially undermines traffic safety; in the local  
24 communities, employers experience negative consequences from  
25 the license suspension because those who have licenses have

Peterson - Cross

1 more stable employment.

2 Your Honor, we have attached as a video to our -- we  
3 cited to it, and with your indulgence -- I know we've run  
4 over. It is about ten minutes. I'd like to play it for Your  
5 Honor so that you can see it so you don't have to go back and  
6 look at it, and then we will wrap up shortly with our case in  
7 chief on the preliminary injunction.

8 Mr. Abel, if you will play it.

9 This is the video from AAMVA that Mr. Carnegie  
10 authenticates.

11 (Video played)

12 MR. BLANK: Thank you, Your Honor, for indulging us  
13 in the video.

14 Two more pieces of evidence. One is behind tab 17,  
15 and this is the -- from the AAMVA website, and it's the Board  
16 of Directors. And our defendant, Mr. Holcomb, is a Board  
17 Director of AAMVA. Just to legitimize, if needed to, AAMVA's  
18 legitimacy, our defendant is on the Board of Directors of  
19 AAMVA. That's behind tab 17.

20 And behind tab 18, while a different issue, is a  
21 letter that's been issued by the Attorney General to Senator  
22 Obenshain dealing with the issue of bail bonds. And while it  
23 is a different issue, the issue dealing with whether or not  
24 low-income defendants and those with money could raise equal  
25 protection questions, that is addressed in his letter. So

Peterson - Cross

1 the Attorney General himself, both in this letter and then we  
2 cited to an interview that he gave in the last three weeks,  
3 where he does expressly address that, tying these issues to  
4 low-income defendants, those with money could raise equal  
5 protection concerns.

6 Your Honor, with that, that is the plaintiffs' case  
7 on our preliminary injunction. We at this time ask for the  
8 notebook to be admitted as Exhibit 1. And if I can approach  
9 the clerk, I'll hand the supplemental Adrainne Johnson  
10 demonstrative as Exhibit 2.

11 THE COURT: All right.

12 MR. BLANK: I think, Your Honor -- I have the  
13 notebook, an additional notebook to hand to the clerk. What  
14 is missing, and I can ask the Commonwealth, is behind tab 16  
15 there is a thumb drive in cellophane, and I would like to  
16 have the thumb drive back.

17 THE COURT: There is a thumb drive in the back of  
18 the one I have.

19 MR. BLANK: That's correct, Your Honor. I didn't  
20 know if the Court -- we were going to give one to the clerk  
21 and one for you to have. So yours has a thumb drive in it as  
22 well.

23 THE COURT: Okay.

24 (Plaintiff's Exhibits 1 and 2 admitted)

25 MR. BLANK: Let me -- Your Honor, we will pass the

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1 baton to the Commonwealth.

2 THE COURT: All right.

3 MS. O'SHEA: Thank you, Your Honor. The defendant  
4 calls Millicent Ford, please.

5 THE COURT: Okay.

6 MILLICENT FORD, CALLED BY THE DEFENDANT, SWORN

7 DIRECT EXAMINATION

8 BY MS. O'SHEA:

9 Q Good afternoon, Ms. Ford.

10 A Good afternoon.

11 Q Would you please introduce yourself to the Court?

12 A Your Honor, I'm Millicent Ford. I'm the Assistant  
13 Commissioner for Driver, Vehicle, and Data Management  
14 Services at DMV.

15 Q What are your responsibilities as the Assistant  
16 Commissioner?

17 A I am responsible for executive level oversight, guidance,  
18 and direction to the driver services, vehicle services, and  
19 data management services administrations at DMV, including  
20 major initiatives and efforts related to process  
21 improvements, policies and procedures related to those areas,  
22 driver licensing, vehicle titling and registration,  
23 suspensions, conviction processing.

24 I'm also responsible for the implementation of special  
25 projects, legislation -- any process improvements, really --

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1 as well as delivering presentations to judges, Commonwealth's  
2 attorneys, and serving as liaison with our various  
3 stakeholders related to those areas.

4 Q How long have you had your current position?

5 A I've been in my current position for approximately two  
6 years.

7 Q And how long have you been with the Department of Motor  
8 Vehicles?

9 A I've been with the Department of Motor Vehicles since May  
10 of 1991.

11 Q During the course of your employment at the Department of  
12 Motor Vehicles, have you had any sort of relationship with  
13 the Office of the Executive Secretary, the OES?

14 A Yes, I have.

15 Q Would you describe that for the Court, please?

16 A My primary responsibility was serving and has been  
17 serving as a liaison with the Supreme Court Office of the  
18 Executive Secretary, working primarily with the Court  
19 Services Managers that -- related to the interface that  
20 exists between the courts, OES, and DMV.

21 Q So you are the liaison between DMV and OES?

22 A Yes.

23 Q Now, you brought up the computer systems, so I will ask  
24 you about those now.

25 How long has the current system been in place, if you

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1 know?

2 A The current system has been in place since -- for about  
3 three years, but there have been gradual improvements in that  
4 process.

5 Q Okay. Currently under the DMV system -- the computer  
6 system, as opposed to receiving papers -- under the computer  
7 system, how do you receive notification that an individual in  
8 a jurisdiction has not paid court-ordered fines and costs?

9 A We receive that information electronically, except for  
10 two courts that exist that transmit paper court orders to us.  
11 But we receive that information electronically from the  
12 courts, through OES, to DMV.

13 Q So when you say you receive it electronically from OES --

14 A Yes.

15 Q -- what is the system called where it's sent from OES to  
16 DMV?

17 A It's referred to as the Court Automated Information  
18 System, and it's basically a system-to-system, a  
19 server-to-server process that exists.

20 Q Now, do you know whether there is a different system or  
21 some other way that the courts get their information to OES,  
22 the individual trial courts?

23 A Based on my work with OES over the years, the court  
24 clerks enter the information into their system. OES has  
25 worked, along with DMV, to program and -- program the

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1 transmission of the data so that certain information  
2 ultimately gets to DMV from the courts through OES so that we  
3 can populate a driver's record. And that might be conviction  
4 information, suspension information, including suspensions  
5 for failure to pay fines and costs.

6 Q Now, do you know whether the -- were you in the courtroom  
7 when Ms. Dugger was testifying earlier?

8 A Yes.

9 Q And she referenced the CCMS system, or the Court Case  
10 Management System?

11 A Yes.

12 Q Is that a system that you are familiar with?

13 A I've heard of the system, the system referred to as the  
14 Case Management System, yes, over the years.

15 Q Okay. Do you know whether the CCMS system is different  
16 than the Court Automated Information System that you were  
17 referring to, CAIS?

18 A I think it's -- I believe the Case Management System that  
19 she referred to feeds into the Court Automated Information  
20 System, again moving data from the courts through OES to DMV.

21 Q And when that data is transferred from CCMS, the Court  
22 Case Management System, to CAIS, the Court Automated  
23 Information System, is that something that -- you know, is  
24 DMV a middleman in that at all?

25 A No. We simply wait to receive information from the

Ford - Direct

1 courts through that system.

2 Q So you only get your information through the Court  
3 Automated Information System, or CAIS?

4 A Yes.

5 Q From the Office of the Executive Secretary?

6 A Yes.

7 Q Now, would you explain to the Court how it is you know  
8 that there has been a suspension issue for nonpayment of  
9 fines and costs?

10 A There is an electronic -- the process that exists in Case  
11 includes an electronic notification regarding court  
12 indicators; first, that the person has -- that the Court is  
13 ordering a suspension for failure to pay fines and costs;  
14 that they were either in person at the time of that  
15 notification of that suspension, or that the court has mailed  
16 that notification to them via the DC225, that process; or  
17 that no notice was given at all.

18 But once that indicator regarding that fines and costs  
19 order comes to us, it comes to us along with an effective  
20 date. So the fines and costs indicator, along with the --  
21 along with the suspension effective date, is what DMV uses  
22 and receives as an order from the Court for us to implement  
23 and record that on the customer's record.

24 Q So, then, when you run the DMV transcript or the driver  
25 history transcript, the suspension for failure to pay fines

Ford - Direct

1 and costs will show up?

2 A Yes.

3 Q If you didn't receive this information from the courts  
4 electronically, does DMV have the discretion to go in and  
5 enter a fines and costs suspension anyways?

6 A No.

7 Q Do you ever get in an order from the courts and say, hey,  
8 maybe this shouldn't be a fines and costs suspension, and  
9 kick it back?

10 A No.

11 Q Do you ever receive any information about how much money  
12 somebody owes in fines and costs?

13 A We get that information. I don't believe it's a  
14 mandatory field, but we -- but we never -- that's not a field  
15 that we use. It's just a part of the information that we  
16 receive related to the conviction, and it comes in as a part  
17 of the conviction record. But that's not anything that DMV  
18 acts upon or takes any action.

19 Q So some courts might send it in and other courts might  
20 not?

21 A Right.

22 Q Okay. Now, with respect to -- are there different types  
23 of suspensions that are entered by DMV administratively as  
24 opposed to through this Court Automated Information System?

25 A Yes.

Ford - Direct

1 Q Okay. What are those types of suspensions?

2 A There are suspensions for non-motor-vehicle-related drug  
3 violations. There are suspensions for DUIs. There are  
4 suspensions for driving while suspended, when you're  
5 suspended for a DUI-related offense.

6 Those are just examples of times when DMV is required to  
7 take administrative action based upon receipt of the  
8 conviction.

9 Q So even if the Court hadn't included a suspension in its  
10 order, DMV will administratively suspend it based on those  
11 specific statutes?

12 A Yes.

13 Q But, again, the difference here is, if the court doesn't  
14 send you the information about nonpayment of fines and costs,  
15 DMV has no discretion to go in and suspend anyone?

16 A That's correct.

17 Q Okay. And once you receive this fines and costs  
18 indicator and the effective date from the court, it then gets  
19 updated on the driving transcript, correct?

20 A That's correct.

21 Q And who is that transcript made available to?

22 A Transcripts are made available to law enforcement,  
23 courts, attorneys; insurance companies have the ability to  
24 get transcripts; and individuals, for personal use.

25 Q Now, we talked about the computer systems and how

Ford - Direct

1 information gets funneled through OES electronically and then  
2 is brought to DMV.

3 Now, you mentioned that there are two jurisdictions that  
4 don't use the computer system, right?

5 A Yes.

6 Q It's Alexandria and Fairfax?

7 A Yes.

8 Q How do you receive information regarding nonpayment of  
9 fines and costs from those jurisdictions?

10 A Those courts send us paper documents directly. They  
11 send -- they mail their paper documents directly to DMV.

12 Q I've handed you a sample form that's labeled at the top  
13 "Abstract of Conviction."

14 Is this an example of the type of form that you might  
15 receive from those two -- the court systems that don't  
16 transmit information electronically?

17 A Yes, it is.

18 Q Okay. So you receive these in the mail?

19 A Yes.

20 Q And what do you do with them when you receive them?

21 A We update the record, update the record to reflect what's  
22 noted on the document.

23 Q Now, if you look in the lower right-hand corner of that  
24 form, there is a specific field regarding fines and costs; is  
25 that correct?

Ford - Direct

1 A Yes.

2 Q And what is the purpose of that little box down there?

3 A The purpose of that box is to -- is to indicate whether  
4 the Court has ordered a suspension for failure to pay court  
5 fines and costs, and when they want DMV to make that  
6 suspension effective.

7 Q If that box isn't filled out from those courts that are  
8 sending you in these paper documents, would DMV suspend a  
9 driver's license or update a transcript to show a suspension?

10 A No.

11 Q From DMV's perspective, is a suspension for nonpayment of  
12 fines and costs done by the court at the time of the  
13 conviction, or is it done administratively by the Department  
14 of Motor Vehicles?

15 A It's done by the courts, not administratively by DMV.

16 MS. O'SHEA: I don't have any other questions.

17 Thank you.

18 THE COURT: Who adds the \$145 reinstatement fee?

19 THE WITNESS: I'm sorry, Judge?

20 THE COURT: The reinstatement fee of \$145, does the  
21 court have anything to do with it?

22 THE WITNESS: That is -- by statute, it requires DMV  
23 to impose \$145 reinstatement fee whenever a person is  
24 suspended for nonpayment of fines and costs. And there's a  
25 few other suspensions that relate to that. But that's

Ford - Direct

1 specifically directed by statute.

2 THE COURT: All right. Okay. Another question.

3 THE WITNESS: Yes.

4 THE COURT: What does it cost to get your initial  
5 driver's license? The fee, what fee do you pay when you go  
6 in and --

7 THE WITNESS: I believe now -- it went up recently,  
8 but I believe it's \$32; \$8 per year.

9 THE COURT: Does it cost any more to process the  
10 initial driver's license than it does to reinstate?

11 THE WITNESS: Umm.

12 THE COURT: Or any less?

13 THE WITNESS: For reinstatement it's -- it's -- when  
14 you're reinstating your driving privilege, there's a process  
15 of all the compliance transactions that we have to handle in  
16 addition to the -- if the person, if they're testing, if  
17 there's testing involved, that has to be completed as well.

18 It's a little longer process --

19 THE COURT: Okay.

20 THE WITNESS: -- depending upon how long they've  
21 been suspended.

22 THE COURT: All right. Okay.

23 MR. BLANK: The Commonwealth would like to ask  
24 another question based on what you said. I don't mind you  
25 going --

Ford - Direct

1 THE COURT: All right. Go ahead.

2 BY MS. O'SHEA:

3 Q Do you know what happens to that DMV reinstatement fee?

4 A Yes. By statute the -- yes.

5 Q What happens to it?

6 A The statute specifically directs DMV to retain \$45 of  
7 that, and \$100 of that goes to the Trauma Center Fund.

8 THE COURT: To the what fund?

9 THE WITNESS: Trauma Center Fund.

10 BY MS. O'SHEA:

11 Q Do you know what the Trauma Center Fund is?

12 MR. BLANK: Judge, I have to object. I don't know  
13 what relevance that could possibly have.

14 THE COURT: Well, I mean, it doesn't have -- it's  
15 another way of the state collecting revenue --

16 MS. O'SHEA: Right.

17 THE COURT: -- to pay other costs that the  
18 Commonwealth incurs.

19 THE WITNESS: I'm not positive of that.

20 THE COURT: It's sort of like the lottery that goes  
21 to the education fund. It has nothing to do -- I mean, you  
22 don't have anything to do with it, I know.

23 THE WITNESS: No.

24 THE COURT: But the \$100 is just earmarked by the  
25 legislature, I'm sure, to pay --

Ford - Cross

1 MS. O'SHEA: Correct. The point of the question was  
2 just that only the \$45 stays at DMV, and that's commensurate  
3 with the --

4 THE COURT: I understand.

5 MS. O'SHEA: -- amount for the initial license.

6 THE COURT: The driver has to pay it; doesn't make  
7 any difference what it's for.

8 All right. I'm sorry. Go ahead.

9 MS. O'SHEA: Thank you. No, that was the only  
10 question I had. Thank you.

11 THE COURT: Okay. Go ahead.

12 MR. BLANK: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. BLANK:

15 Q Ms. Ford, thank you for your time. You're not -- you've  
16 never been employed by a district court, have you?

17 A I have not.

18 Q You've never been employed by a circuit court?

19 A I have not.

20 Q You've never been behind a desk dealing with the computer  
21 screens that Ms. Moats testified about?

22 A I have not.

23 Q And you haven't been in a circuit court dealing with the  
24 screens that Ms. Dugger was testifying about?

25 A I have not.

Ford - Cross

1 Q In fact, you've not gone and looked at any of the court  
2 records for any of these plaintiffs, correct?

3 A The court records?

4 Q Yes.

5 A No, I have not.

6 Q And you haven't looked at any court records for anybody  
7 that's driving while suspended, or had their license  
8 suspended for failure to court debts and fines, have you?

9 A No, I don't have access to that.

10 Q You don't have access to the court records, correct? You  
11 don't have access to the court records; is that what you  
12 said?

13 A Just as it relates to the information that's been  
14 transmitted by the court.

15 Q You don't -- you're not -- you have no idea whether or  
16 not there's a court order that suspends the license in the  
17 court record, do you?

18 A Only based upon the information; but no.

19 Q You haven't seen it?

20 A No.

21 Q You haven't seen it?

22 A I haven't seen it.

23 Q And, in fact, in your affidavit, you said you assume that  
24 it's there.

25 You're just making an assumption of what's in that court

Ford - Cross

1 record, correct?

2 A Based upon what the court has submitted to us.

3 Q But you haven't gone and looked at the record?

4 A No.

5 Q And Ms. Dugger said there's no order in the court file.

6 You have nothing to refute that, do you?

7 A No.

8 Q And Ms. Moats said there's no court order. You have

9 nothing to refute that?

10 A No, just based upon what the Court said.

11 Q You're not saying that the DMV doesn't have anything to  
12 do with the license suspension, are you?

13 A I'm saying that, by statute, certain suspensions are  
14 ordered by the Court and certain suspensions are ordered by  
15 DMV; and fines and costs isn't one.

16 Q That's not my question.

17 A Oh.

18 Q Let's refine it. For court suspensions -- excuse me, for  
19 license suspensions for failure to pay court debts and  
20 fines -- let's focus on that, because that's what this case  
21 is about.

22 A Okay.

23 Q You're not saying that DMV has anything to do with  
24 license suspensions, are you?

25 A The ordering of a suspension, yes, that's what I'm

Ford - Cross

1 saying.

2 Q No, no, I'm not talking -- you're parsing words.

3 A Okay.

4 Q I'm talking about any part of it. DMV has got something  
5 to do with license suspensions, correct?

6 A Correct.

7 Q And they have something to do with license suspensions  
8 for failure to court debts and fines; something?

9 A Reinstating them, yes.

10 Q Even the actual computer system that you talked about has  
11 something to do with the actual suspension. Not  
12 reinstatement; I'm talking about suspension. Those computer  
13 systems are talking to each other.

14 Your system and the court system and the OES system,  
15 they're interfaced, correct?

16 A There's an interface, yes.

17 Q So if DMV wasn't there, it couldn't happen, could it?  
18 There couldn't be a suspension, could there, for failure to  
19 pay court debts and costs?

20 A We act on what the court sends us, yes.

21 Q But you have to be there for it to be suspended, correct?

22 A We put it on the record, yes, sir.

23 Q If DMV didn't exist, would a license be suspended for  
24 failure to pay court debts and fines?

25 A We would not do it based upon -- I --

## Ford - Redirect

1 Q If DMV didn't exist --

2 A Uh-huh.

3 Q -- could you suspend a license for failure to pay court  
4 debts and fines?

5 A No. The record would not show it.

6 MR. BLANK: No further questions, Your Honor.

7 THE WITNESS: Wow.

8 THE COURT: All right. Thank you.

9 REDIRECT EXAMINATION

10 BY MS. O'SHEA:

11 Q Would you agree that there's a difference between the  
12 record reflecting a suspension and the entity that issues the  
13 suspension in the first instance?

14 A Yes, there is.

15 Q So when the court issues a suspension, is it effective  
16 from the moment that the court issues it, regardless of  
17 whether or not it's ultimately updated on somebody's  
18 transcript?

19 A Yes.

20 MR. BLANK: Objection to the question, Judge,  
21 because it definitely calls for a legal conclusion. She's  
22 not in the court system to make --

23 THE COURT: Well, that's covered by the statute. I  
24 mean, the law makes it effective as stated, right?

25 MS. O'SHEA: Correct.

Ford - Redirect

1 MR. BLANK: Your Honor, we disagree with that  
2 interpretation, which we can deal with.

3 THE COURT: Okay.

4 MR. BLANK: And I think the testimony --

5 THE COURT: It's a legal question.

6 MR. BLANK: I think the testimony so far is that it  
7 doesn't happen until 41 days, and it's after the failure to  
8 pay.

9 THE COURT: Right.

10 MR. BLANK: So I think she testified that it's day  
11 one, and I don't think that's what the evidence shows.

12 THE COURT: Okay.

13 BY MS. O'SHEA:

14 Q So if there's been a court-ordered suspension, let's say,  
15 in a different context -- somebody is convicted of a DUI  
16 third and the Court suspends their license for 90 days, all  
17 right, and it's an actual court conviction, or the judge  
18 signs an order that says, I am suspending your license --

19 Right?

20 A Yes.

21 Q -- does DMV have to receive a copy of that order before  
22 the suspension is real, or is it real from the moment that  
23 the judge signs his name on the bottom line?

24 MR. BLANK: Objection. Again, I'm not sure she can  
25 testify to that, but --

## Ford - Redirect

1           THE COURT: Well, I think when the judge suspends it  
2 and the person is there, it's effective right then. Isn't  
3 that the point you're making?

4           MS. O'SHEA: It is, Judge. So if Your Honor is  
5 satisfied with that, then I won't --

6           THE COURT: Yeah, there's no question about that.

7           MS. O'SHEA: I won't walk down that path any  
8 further, then.

9 BY MS. O'SHEA:

10 Q       So you were asked, as well, if you had been in court or  
11 in the court clerk's offices.

12       In your role as liaison to OES and your job as Assistant  
13 Commissioner, though, do you interact at all with the court  
14 clerks?

15 A       In past years in roles prior to this, I attended clerk's  
16 conferences, circuit court conferences, as well as general  
17 district court conferences.

18 Q       Were you involved in any training at all with the court  
19 clerks?

20 A       Yes, when they had regional conferences, regional  
21 meetings, which involved presentations from DMV, as well as  
22 the all-state conferences.

23 Q       Did any of those presentations or trainings revolve  
24 around this information communication from the clerk's  
25 offices to DMV through the computer system?

## Ford - Redirect

1 A Yes, because we wanted the clerks to understand how the  
2 process works so that when there were questions about what  
3 DMV received and why a customer may be in front of us saying,  
4 you know, the Court suspended, we would -- they would  
5 understand how the process worked and how we knew what we had  
6 on the record was correct or incorrect.

7 MS. O'SHEA: Okay. Thank you.

8 And, Your Honor, at this time I'd also like to move  
9 to admit the blank sample document that I handed up to the  
10 witness earlier, and that would be Defense Exhibit 2.

11 MR. BLANK: No objection.

12 THE COURT: Okay. It will be admitted.

13 (Defendant's Exhibit 2 admitted)

14 MS. O'SHEA: Thank you. I don't have any other  
15 questions.

16 THE COURT: Thank you. You may step down.

17 MS. O'SHEA: No further evidence or witnesses from  
18 the defense, sir. Just argument.

19 THE COURT: Okay. Would y'all like to argue just  
20 for a few minutes?

21 MR. BLANK: Judge, I know it's a little abnormal,  
22 but I have a specific presentation that I would like to make,  
23 and then Ms. Ciolfi would like to address some specific  
24 issues that were brought up today in terms of payment plans,  
25 statute interpretation, and redressability. So we'd like to

1 split up the argument briefly.

2 THE COURT: All right.

3 MR. BLANK: And I won't take too long in opening,  
4 Your Honor.

5 Judge, why are we here today? That's always a  
6 question that I know you ask yourself and ask me. And I'll  
7 start basically with our order that we're asking.

8 We're asking for a preliminary injunction. We're  
9 asking for an order that during the pendency of this  
10 action -- because we're not at motion to dismiss; we're not  
11 at ultimate issue; we're at pendency of action right now --  
12 that the Commissioner is enjoined from enforcing 46.2-395 of  
13 the Virginia Code against the plaintiffs, and the putative  
14 class, unless and until defendant or another entity  
15 determines through a hearing, with adequate notice thereof,  
16 that the failure to pay was willful, not excusable because of  
17 inability to pay. We think that you should stop this  
18 practice of just automatically suspending without asking  
19 people: Can you pay?

20 The Commissioner also should remove the current  
21 suspension of the five plaintiffs, because you have the  
22 evidence in their declaration to show that they've got  
23 irreparable and immediate harm and that their constitutional  
24 rights have been deprived. So we would ask to remove the  
25 suspension for them.

1           And then we ask that the Commissioner's enjoined  
2 from charging the fee to reinstate them.

3           That's the three things we're asking. But why? Why  
4 are we asking that?

5           It's not often that I get to come here and argue  
6 constitutional law. I spent a lot of time preparing for it.  
7 But to answer the question of why we're here: We're here  
8 because the Constitution of the United States of America  
9 guarantees that the Commonwealth of Virginia may not deprive  
10 any person of life, they may not deprive them of liberty or  
11 property, without due process of law. We learned it in  
12 elementary school up through high school and college. We're  
13 here. It is real. It is real because of Ms. Johnson and it  
14 is real because of the other people that are in this  
15 Commonwealth that are suffering.

16           We're here because the United States Supreme Court  
17 in *Bearden* tells you, and tells us, you cannot punish a  
18 person because they lack the resources to pay a debt, like  
19 Ms. Johnson told you.

20           We're here because the United States Supreme Court  
21 in *Bell*, the Fourth Circuit in *Scott* and *Plummer*, told us  
22 that a driver's license is a property -- protected property  
23 right that can't be taken away without procedural due  
24 process. It can't be taken away without a form of a  
25 pre-deprivation hearing, with notice and opportunity to be

1 heard.

2           And the evidence in this case is uncontradicted that  
3 that doesn't happen. That doesn't happen before the default.

4           When Ms. Ciolfi said T1, that's not what we're  
5 talking about. We're talking about T2. T2, Time 2, when  
6 that default happens, nobody gets any notice. Ms. Johnson  
7 testified to it. No Court asks you: Can you pay? Can you  
8 not pay? That is just what is just diametrically wrong and  
9 diabolically wrong with this system.

10          We're here because the Supreme Court, in *Griffin* and  
11 *Williams* and *Tate* and *Meyer* and *Bearden*, this history of  
12 court cases, they made it clear you can't treat people who  
13 are unable to pay differently from people who are able to  
14 pay.

15          We're here because this is the modern-day debtors'  
16 prison. We've got close to a million people, or 700,000  
17 prisoners, who are facing captivity in our system that  
18 requires a driver's license. You heard Mr. Peterson, you  
19 heard -- excuse me, Dr. Peterson, you heard Dr. Pearce, that,  
20 again, our system requires this driver's license to have  
21 specific jobs, to get to jobs, to take your kids, to go see  
22 them in a sporting event. It is there as a protected  
23 property right. And we've got hundreds -- we've got  
24 thousands of people that, through this system, end up in  
25 jail; hundreds of thousands of days of jail time.

1           We're here because Justice Gregory told the  
2 Commonwealth in oral argument -- you can go back and you can  
3 listen to it -- the Commissioner is doing it. He's carrying  
4 out the will of the state. It's a question of whether or not  
5 it's constitutional in terms of economic justice.

6           Almost nearly a million Virginians, many of whom  
7 because of their poverty can't drive, poverty alone. And  
8 there's no differentiation between someone who is  
9 recalcitrant, refusal to pay, versus the inability to pay,  
10 because our system doesn't ask that question.

11          We're here because the Tennessee federal judge, less  
12 than a month ago, and earlier in June, took the exact same  
13 arguments that I expect you're going to hear from the  
14 Commonwealth -- and you saw it in their briefs -- and she  
15 rejected every single one of them. It's on appeal to the  
16 Sixth Circuit, granted, but she rejected them because they  
17 are constitutional principles that do not support the  
18 argument to defend this system based on the *Rooker-Feldman* or  
19 the abstention doctrine or immunity. There's constitutional  
20 violations going on.

21          A separate Michigan judge, separate from the  
22 Tennessee judge, looked at those statutes that are similar to  
23 ours and entered injunctions stopping the state from  
24 continuing the practice.

25          We're here because our named plaintiffs, Ms. Johnson

1 included, and 700 of our fellow citizens, are being harmed  
2 immediately and irreparably by 46.2-395 in an  
3 unconstitutional and an un-American way. We're here to ask  
4 you to stop that practice. Stop the practice to allow people  
5 who are unable to pay to have the license to take care of  
6 their kids. Let them drive to a job. Let them go to a  
7 medical appointment. Let them take their kids to a medical  
8 appointment. Let them have the opportunity to lift  
9 themselves up so that they can pay the fine, so that Virginia  
10 can get the money.

11           We're here to ask you to take the action based on  
12 your statement. With all due respect, Judge, you put it in  
13 your opinion in the last pages. You said on your statement  
14 on Virginia Code 46.2-395, "Automatic suspension of a  
15 driver's license for nonpayment of court fees and fines,  
16 regardless of inability to pay, may very well violate  
17 plaintiffs' rights to due process and equal protection."

18           That goes to the very first prong, the elements for  
19 the motion for a protective order -- for preliminary  
20 injunction. Excuse me. Are we likely to prevail on  
21 plaintiffs' claims? We don't have to prove all of them. We  
22 don't have to prove them today. We have to show that we're  
23 likely to be successful on the merits.

24           And you even said it yourself. Taking aside the  
25 jurisdictional question that, according to you and according

1 to the Tennessee judge, according to Justice Gregory,  
2 according to Michigan, we are likely to prevail on the legal  
3 side, the legal discussion on these constitutional  
4 deprivations, on the fact that there's a fundamental  
5 fairness, a due process, that's been violated; that there's a  
6 procedural due process leg to the deprivation claim,  
7 substantive due process of taking away a property right,  
8 equal protection of treating people different because they're  
9 unable to pay versus unwilling to pay; equal protection  
10 because it treats debtors in the Commonwealth differently  
11 from those with civil debts.

12 We are likely to succeed, I think, on all of it, but  
13 we are certainly likely to succeed on one of them; and that's  
14 the criteria that we're here today on.

15 Look at the physical evidence that we brought before  
16 you, the physical evidence. Again, Ms. Johnson testified in  
17 terms of wanting to be able to do this; the inability to pay,  
18 what it does to her; the likelihood that she should be able  
19 to succeed on the merits because she was not given the  
20 opportunity at the default time, not later, not earlier, but  
21 at the time of default, to be asked -- and Ms. Ciolfi asked  
22 her: Were you asked could you pay? How could you pay?  
23 Could you do community service? Those things, nobody asked  
24 her, because it doesn't exist in our system. It doesn't  
25 exist at that time, the time before default.

1           You heard Dr. Peterson testify, \$1,200 to get out of  
2 jail, no rational person would not pay that money unless they  
3 were unable to pay. That's the uncontroverted evidence from  
4 a Harvard Ph.D. economist that came here from Arlington,  
5 Massachusetts, outside of Boston. That's his testimony.

6           You heard Dr. Pearce that, again, basic needs, the  
7 inability to pay for basic needs, if you put one more dollar  
8 on the payment plan, that person is going to not -- these  
9 people can't even afford their basic needs, but you're going  
10 to add to it.

11           Again, the inability to pay is fundamental to these  
12 constitutional rights. If you're just going to set up that  
13 system that automatically does it, it's just not there.

14           You heard irreparable harm. You heard it from  
15 Ms. Johnson. You heard it from Dr. Pearce. You heard it  
16 from Dr. Peterson. Those caught up in this vicious cycle,  
17 they continue to suffer immediate and irreparable harm.

18           And I don't know how the Commonwealth can come up  
19 and say that those people aren't being harmed on a daily  
20 basis, in a society that we should not do that. We should be  
21 giving people an opportunity to lift themselves up. We  
22 shouldn't be forcing them down.

23           That may sound like a political speech, but that's a  
24 constitutional fundamental fairness if it's based on  
25 inability to pay versus ability to pay.

1           We're not saying get rid of the system for people  
2 that can pay. If somebody -- if you have this injunction  
3 that's in place, it's not getting rid of any of the things  
4 that the state has the ability to do. Let them ask the  
5 person: Can you pay? Test it. Can you pay? Because I'm  
6 going to pay if I have the money. I'm not going -- as  
7 Dr. Peterson says, I'm not going to put myself in jeopardy of  
8 going to jail. I'm not going to put myself in jeopardy of  
9 going to court.

10           If you have that pre-deprivation hearing, the  
11 constitutional rights will be acknowledged. The equities are  
12 clearly in favor. The Commissioner has no hardship enforced  
13 upon him by following this constitutional standard. If you  
14 are following the Constitution, again, by asking this  
15 question, are people unable to pay versus able to pay, again,  
16 that is not a hardship on a Commissioner when close to a  
17 million Virginians or, again, if it's the 700,000, have been  
18 stripped of their right because they're too poor.

19           The Attorney General, who they work for, said in his  
20 interview we cannot have a justice system that determines  
21 fairness and freedom based on wealth and means.

22           That is the system we have with an automatic  
23 suspension of licenses.

24           And, again, Judge Moon, you said yourself in that  
25 opinion, it may very well violate plaintiffs' constitutional

1 rights to due process and equal protection.

2 You should stop it today. Stop it today, until we  
3 find out the ultimate issue in this case of the violation of  
4 the plaintiffs' constitutional rights to due process and  
5 equal protection.

6 We put on all of this evidence. It's overwhelmingly  
7 in our favor to enter this injunction now so that it doesn't  
8 continue to happen to more Virginians, to put them in this  
9 vicious cycle that could ultimately end up in jail time. But  
10 even if it doesn't, it's keeping them from having a protected  
11 property right, keeping them from satisfying the basic needs  
12 that they need to support their families and to be a  
13 productive part of this society.

14 We ask you today to stop it today, and then we can  
15 go on, we can have whatever hearings we want, we can come in  
16 and we can deal with the constitutional issues, but this  
17 should stop today.

18 I pass it to Ms. Ciolfi and she can answer the three  
19 specific questions that came up with regard to the payment  
20 plan, redressability, and interpretation.

21 Thank you, Your Honor.

22 MS. CIOLFI: Your Honor, I really appreciate the  
23 time that the Court has given us to put on our case today,  
24 and I just want to address a few matters that came up during  
25 the testimony.

1           You heard a lot about payment plans today. And as  
2 an initial matter, it is important to stress that the  
3 plaintiffs are not challenging the availability of payment  
4 plans, the availability of community service and debt  
5 forgiveness.

6           The availability, or lack thereof, of these  
7 alternatives does nothing to change the fact that when a  
8 payment is due and not received, the nonpayment is assumed by  
9 the Commonwealth to be willful for the purpose of license  
10 suspension.

11           And so putting aside the questions, serious  
12 questions, about whether plaintiffs -- or whether defendants  
13 in criminal traffic cases receive adequate notice of the  
14 availability of these alternatives, their hypothetical  
15 availability of payment plans or community service is no  
16 substitute for a pre-deprivation hearing or a determination  
17 of willfulness, which is required before the state can take  
18 action to punish nonpayment.

19           And, in fact, Ms. O'Shea's questioning of Dr. Pearce  
20 about an individualized determination of ability to pay only  
21 demonstrates the need for that kind of inquiry before the  
22 state takes action to penalize a person for nonpayment.

23           In rejecting a similar defense from the Tennessee  
24 Commissioner Judge Trauger in the Middle District of  
25 Tennessee says, "What the plaintiffs seek is not merely the

1 opportunity to throw themselves upon the mercy of the Court  
2 in a proceeding in which indigence may be one factor of many  
3 for the Court to consider or disregard; they seek the right  
4 to a pre-deprivation hearing in which they are allowed to  
5 demonstrate their eligibility for an exception based on  
6 indigence."

7 I also want to address the references to debt  
8 forgiveness, which came up during Ms. Johnson's testimony and  
9 also has been in the Commonwealth's briefs. Those references  
10 to Virginia Code 19.2-358(C) are misleading. The forgiveness  
11 of court debt is available only upon the issuance of a show  
12 cause by a Court or a prosecutor for failure to pay which may  
13 result in the defendant's confinement or the imposition of an  
14 additional fine.

15 So it's simply not the case that one of our  
16 plaintiffs could walk into court and ask for debt  
17 forgiveness. And it's only in the event of a successful  
18 defense to the show cause does the Court even have the option  
19 of considering debt forgiveness. And the show cause statute  
20 doesn't address license suspension at all.

21 There have been amendments to the code regarding  
22 payment plans, but those ultimately have nothing to do with  
23 the plaintiffs' challenge to the automatic suspension  
24 statute. They didn't amend the suspension statute. And the  
25 lack of a meaningful alternative can be inferred from the

1 fact that the Commissioner continued to suspend licenses each  
2 month for failure to pay court costs and fines from February  
3 2017, when first the Supreme Court ruled, and then later that  
4 year, in July, the statute which made those amendments to  
5 payment plans. The Commissioner continued to suspend  
6 licenses, tens of thousands of licenses each month, for  
7 failure to pay. And as of December 2017, ten months after  
8 the rule went into effect, there were still nearly a million  
9 licenses suspended.

10 I suspect the Commissioner is going to rely heavily  
11 on the wording of the statute where it says "The Court shall  
12 forthwith suspend" and cleave to the Court's previous holding  
13 that every conviction involving the assessment of court debt  
14 immediately triggers a court-ordered suspension of the  
15 defendant's license that is a legal reality without  
16 involvement by the Commissioner.

17 But this interpretation simply fails to make sense  
18 of the text of that statute. It renders the statute  
19 inconsistent with related statutes, which clearly gives  
20 30 days to pay in order to avoid license suspension, and  
21 conflicts with the interpretation of that statute, the  
22 authoritative interpretation of that statute, by two distinct  
23 Courts of Appeals, Virginia Courts of Appeals, in *Plummer* and  
24 *Carew*.

25 And, in fact, under the statute as interpreted by

1 the Virginia courts and as alleged in the amended complaint,  
2 payment is due 30 days after sentencing, not immediately upon  
3 assessment. The suspension of the driver's license is  
4 triggered by the failure to pay within 30 days, not at the  
5 moment of conviction. And the suspension is not effective  
6 until it is implemented by the DMV and the debtor receives  
7 notice of that implementation.

8 It's just not plausible that everyone who is  
9 convicted of an offense is walking around with a latent  
10 license suspension hanging over their heads. That's not, in  
11 fact, what the Commonwealth said in 2017 when we were back  
12 here arguing the motion to dismiss, and it's not what two  
13 different Virginia Courts of Appeals have held.

14 And on what the Commonwealth said, quoting from the  
15 transcript of the motion to dismiss hearing at page 15, Ms.  
16 O'Shea, in response to the Court's questioning, said, "I'm  
17 talking about at the time of your criminal conviction and the  
18 Court says, 'You owe us \$500. Pay us \$500. You have 30 days  
19 to pay under the statute.' There is no suspension at all  
20 until the 30 days has lapsed and you haven't paid, and that's  
21 when the suspension goes into effect."

22 Your Honor, *Plummer* and later in -- as recently as  
23 2013, in *Carew*, the Virginia Court of Appeals has made it  
24 clear that it is the DMV, not the sentencing court, that  
25 suspends the driver's license, and that the suspension is not

1 self-executing but occurs after the DMV executes the  
2 suspension.

3 That makes it different from the colloquy that Your  
4 Honor had with Ms. O'Shea earlier about licenses that are  
5 suspended for driving reasons, where the person has actually  
6 been tried and convicted of a driving offense and is standing  
7 right there in the court when the Court orders the  
8 suspension.

9 And then, finally, to address some of the standing  
10 issues, the plaintiffs, of course, contend that it's the DMV  
11 that actually suspended their licenses, but even if one  
12 relies on the statutory language to conclude it's the courts,  
13 the plaintiffs' injuries are nevertheless directly traceable  
14 to the Commissioner's conduct in implementing those  
15 suspensions, which cannot be accomplished legally, according  
16 to the Court of Appeals in *Plummer* and *Carew*, without action  
17 by the DMV, regardless of any upstream activity by the  
18 courts.

19 And in a case, an opinion issued just a couple of  
20 weeks after this Court rendered its decision in the motion to  
21 dismiss in 2017, in *Lamar versus Ebert*, the Fourth Circuit  
22 made it absolutely clear that in challenging a statute's  
23 constitutionality, the fact that the defendant, quote, "is  
24 but one of several persons or entities in charge of  
25 implementing it is not controlling," unquote, so long as

1 there's a causal connection. That's *Lamar versus Ebert*,  
2 which is cited in our briefs. It's 2017 WestLaw 1040450, at  
3 page 5.

4                 The amended complaint at paragraphs 62 to 84  
5 describe the Commissioner's role in enforcing the statute,  
6 that's corroborated by Ms. Ford here today, including the  
7 Commissioner's overall responsibility for the issuance and  
8 suspension of driver's licenses, the Commissioner's specific  
9 role in working with OES to develop and implement an  
10 automated system to enforce the statute, the Commissioner's  
11 maintenance of an database of individual driver profiles that  
12 are updated based on information received from the state, and  
13 the fact that, as you'll see from Exhibit 3 of the amended  
14 complaint, that the Commissioner issues automatic suspensions  
15 without confirming the existence of a Court order and, in  
16 many cases, when there is no evidence thereof.

17                 The Commissioner further will not reinstate the  
18 plaintiffs' licenses until they satisfy their court debt  
19 entirely or obtain payment plans and then, should the  
20 plaintiffs ever become eligible to reinstate, the  
21 Commissioner would first have to be paid \$145, at least,  
22 possibly more if they have multiple orders.

23                 Turning to redressability, and then I'll wrap up:  
24 Redressability turns on whether an order from this Court  
25 would provide meaningful relief to the plaintiffs. And it

1 would. If the plaintiffs are successful in proving that the  
2 suspension process is constitutionally flawed, this Court  
3 could declare Virginia Code 46.2-395 unconstitutional, which  
4 would invalidate the suspensions flowing from it.

5 Moreover, the Court could order the Commissioner to  
6 remove the unconstitutional suspensions from DMV's database  
7 and enjoin the Commissioner from participating in future  
8 enforcement of the statute.

9 It's, again, the DMV that makes these suspensions  
10 meaningful because everyone, including law enforcement and  
11 the courts -- I don't think there's any disagreement about  
12 that -- relies solely on the information maintained by the  
13 DMV to document license suspensions.

14 Once those suspensions are removed from the  
15 database, the plaintiffs would not have to pay reinstatement  
16 fees, they would not be arrested for driving on suspended  
17 licenses, and they would be able to provide proof of a valid  
18 license to employers.

19 In other words, removal of these invalid suspensions  
20 from the database would free most of the plaintiffs from the  
21 terrible dilemma they now face: driving illegally and risking  
22 incarceration, or staying at home and failing to pay off  
23 their court debt or meet the needs of their families.

24 Importantly, none of these changes would affect the  
25 manner in which Virginia courts go about the business of

1 assessing and collecting fines and costs. The Courts could  
2 still enter judgments imposing fees and costs; court clerks  
3 could continue to enter payment information into the system,  
4 which would continue to flag accounts in default.

5 The Court could also issue orders to show cause for  
6 failure to pay, make contempt findings, impose fines or jail  
7 time, garnish wages, impose liens on personal property, and  
8 obtain hold-backs from the tax department from federal and  
9 state tax refunds. All of the remedies currently available  
10 to the courts to enforce judgments, assessing fees and costs,  
11 would remain available to them. The only thing that would  
12 not happen is that the DMV would no longer issue a driver's  
13 license suspension upon receiving notice of nonpayment.

14 And, finally, perhaps the best proof that the courts  
15 need not be part of any relief is that the Commissioner is  
16 currently working on a system where a debtor can walk into a  
17 DMV customer service center and pay all of their court debt,  
18 and DMV will reinstate their license without any court  
19 involvement. That is a system that is being worked on and  
20 reported on by the Commissioner. And you'll see that is  
21 attached to our -- the letter from Commissioner Holcomb to  
22 the General Assembly is attached to our amended complaint at  
23 Exhibit 4.

24 And the point is, if the Commissioner's customer  
25 service representatives can accept payment from the

1 plaintiffs and remove their suspensions that were issued  
2 under the Virginia Code 46.2-395, and reinstate their  
3 licenses upon payment of the \$145 fee, all without any action  
4 by the convicting courts, then certainly the Commissioner  
5 could comply with an order from this Court to remove the  
6 unconstitutional license suspensions.

7           Thank you.

8           THE COURT: Okay.

9           MS. O'SHEA: Good afternoon, Your Honor.

10          Mr. Blank stood up before the Court and he gave you  
11 a litany of reasons why he believes that we are here in the  
12 courtroom today. I would submit to the Court that there is a  
13 question on the part of the DMV Commissioner as to why we are  
14 here in the courtroom today.

15          In the Court's detailed prior opinion, the Court let  
16 the plaintiffs know, with no uncertainty, that they had sued  
17 the wrong defendant. The DMV Commissioner does not suspend  
18 licenses for failure to pay fines and costs. They are  
19 seeking a remedy against a defendant who is not empowered to  
20 grant the relief that they seek. There are other forums.  
21 There are policymaking forums and there are the courts.

22          THE COURT: If the Commissioner did not make  
23 available to the police the records, then that would go a  
24 long ways toward --

25          MS. O'SHEA: Well, not necessarily. I still don't

1 think that that wouldn't erase the fact that the Court issued  
2 the suspension in the first place.

3           The analogy I would make would be to, like, a VCIN,  
4 or an NCIC report, the criminal records that are made  
5 available by computer to a police officer. VCIN, for  
6 example, is run through the state police, the Virginia state  
7 police. And so a police officer pulls over somebody or  
8 interacts with somebody, pulls up their VCIN, and sees what  
9 their criminal record is.

10           This Court could order, perhaps, the Department of  
11 the State Police to take a conviction off of that abstract so  
12 it would no longer be available to the officer who was  
13 looking to see what a person's prior convictions were. For  
14 example, maybe he's trying to see if they have prior petty  
15 larceny convictions to make a petty larceny third.

16           Taking a conviction off the transcript doesn't make  
17 the conviction go away. It still exists. It's still on the  
18 Court order. It may not be available to as many people. The  
19 record of it might not be disseminated as freely to the  
20 public and other law enforcement agencies, but the conviction  
21 still exists.

22           THE COURT: Well, if the Court should rule that the  
23 process is unconstitutional and say that the Commissioner  
24 cannot do anything to enforce the law, I mean, the ruling  
25 would affect the courts, too.

1           MS. O'SHEA: Well, Your Honor, I think that relies  
2 on the faulty supposition that the Commissioner enforces the  
3 order. The Commissioner is the record-keeper for these  
4 suspensions; he puts it on the transcript, but he doesn't  
5 enforce them. He updates the information and puts it on the  
6 database, certainly, but he's not the enforcing entity. The  
7 courts are. The court clerks are, not the Commissioner.

8           The plaintiffs are asking this Court to judicially  
9 rewrite the statute, to give the Commissioner a role he does  
10 not have and the General Assembly has not seen fit to give  
11 him.

12           In this role specific to fines and costs,  
13 suspensions, he is a record-keeper and not an actor. They  
14 need to bring their suit against an actor.

15           THE COURT: What is the remedy of the debtor when  
16 the license is suspended and he sends the -- he gets the  
17 letter, I guess, from the court, some form comes from the  
18 court, saying your license has been suspended because you did  
19 not pay the fine and costs. Okay?

20           MS. O'SHEA: Yes.

21           THE COURT: What is his remedy then?

22           MS. O'SHEA: To go to the court that issued the  
23 suspension and talk to the Court, go in and talk to the judge  
24 in chambers, like you heard one of the witnesses talk about;  
25 enter into a payment plan; apply for a restricted license; do

1 all of those things that are made available to you as a  
2 judgment debtor under Virginia law. But to go to the courts.

3 If you were to show up at DMV headquarters and say,  
4 hey, the Court suspended my license for nonpayment of fines  
5 and costs, there's nothing the DMV Commissioner can do for  
6 you.

7 THE COURT: But even if he paid the court costs, all  
8 he gets is a right to go to DMV to pay another \$145 to get  
9 his license.

10 MS. O'SHEA: To get his license completely restored,  
11 yes, but not to undo the suspension. The suspension is  
12 undone upon the payment, and then it's marked as restored  
13 once you pay the reinstatement fee.

14 THE COURT: Right. But he can still be convicted in  
15 between the time he pays his court fees and the time that --  
16 if he drives, in between the time he pays his court fees and  
17 pays the \$145.

18 MS. O'SHEA: Not for driving on a suspended license.  
19 It would be for driving without a license, which is  
20 different.

21 So it's different, Your Honor. The suspension is  
22 undone once you pay that to the court. You don't have an  
23 effective license, but you also don't have a suspended  
24 license, which implicates different principles.

25 THE COURT: But if you're poor, maybe you can pay

1 the court all your money, but then you can't -- you don't  
2 have the \$145 to pay the Commissioner.

3 MS. O'SHEA: But you're not suspended.

4 THE COURT: But you're still hurt, because if you  
5 pay the court all your money to get rid of the fines and  
6 costs, you still owe the \$145, and you might not be able to  
7 pay it.

8 MS. O'SHEA: You do owe the \$145 to the Department  
9 of Motor Vehicles to get an effective license.

10 THE COURT: There's no forgiveness there. I mean,  
11 right?

12 MS. O'SHEA: I don't believe so. That's the statute  
13 that was set up by the General Assembly. The Commissioner  
14 doesn't have any discretion there, either.

15 THE COURT: Well, I know, because the state can't  
16 just charge people money without some sort of process.

17 MS. O'SHEA: Well, but the state can condition the  
18 granting of a privilege upon the payment of money. That's  
19 what they do with going to get your driver's license in the  
20 first place. You don't get a driver's license for free.  
21 There are other privileges that you don't get for free,  
22 either. The state can condition --

23 THE COURT: But the DMV then is getting the  
24 advantage of what the plaintiff says is an unconstitutional  
25 process.

1 MS. O'SHEA: What they say is an unconstitutional  
2 process.

3 THE COURT: Well, that will be determined.

4 MS. O'SHEA: Right.

5 THE COURT: But still, if it's an unconstitutional  
6 process that the state has imposed on the courts, that  
7 requires the courts to act in an unconstitutional way through  
8 the statute, then they're getting a second crack at it by  
9 requiring the Commissioner to collect \$145 and send them \$100  
10 and the Commissioner takes -- keeps \$45. Or I guess it goes  
11 in the general fund as a matter of accounting, but still, the  
12 Commissioner is getting the -- the Commissioner is enforcing  
13 the \$145 extra charge.

14 MS. O'SHEA: Right. But the \$145 is separate and  
15 apart from the suspension. It's not part and parcel.

16 THE COURT: It wouldn't be there except for the  
17 suspension having occurred.

18 MS. O'SHEA: I'm not a hundred percent certain that  
19 that's true. Like, if I allow my driver's license to lapse  
20 and I don't get it renewed, I don't know if there's --

21 THE COURT: That's not this situation, though. Your  
22 license is suspended because you didn't pay the fines and  
23 costs.

24 MS. O'SHEA: Right. What I'm saying is, I don't  
25 know if this \$145 is only for people who seek reinstatement

1 after suspension, or it's for anybody who seeks reinstatement  
2 after a license stops being effective.

3 THE COURT: Well, everybody -- you have to do  
4 something to owe the \$145.

5 MS. O'SHEA: Correct.

6 THE COURT: But here, taking the plaintiffs' case,  
7 unconstitutionally the defendant, the debtor, is put in a  
8 position where he owes the \$145.

9 MS. O'SHEA: If -- but --

10 THE COURT: Or he loses a property right, which is  
11 his driver's license, or is not able to have it restored to  
12 him.

13 MS. O'SHEA: Correct. So the argument there, A, it  
14 presupposes that there was an unconstitutional deprivation in  
15 the first place, which the Commissioner contests; and B, I'm  
16 not aware of any case law that says that the Commonwealth  
17 can't --

18 THE COURT: Well, if it's not unconstitutional,  
19 there's no problem.

20 MS. O'SHEA: There's no problem.

21 THE COURT: So, I mean, just presuming for the --  
22 assuming hypothetically that it's an unconstitutional  
23 process, either the courts did it all in -- I don't want to  
24 say "cahoots," but following the directions of the  
25 legislature, still there's a separate -- the debtor still has

1 to pay this other \$145, which comes about because of the  
2 unconstitutional process in the court.

3 MS. O'SHEA: Right, assuming that it's an  
4 unconstitutional process in the court.

5 THE COURT: Okay.

6 MS. O'SHEA: Right.

7 THE COURT: And Judge Gregory was quite impressed  
8 with that fact, as I recall.

9 MS. O'SHEA: Right, Judge Gregory and only Judge  
10 Gregory.

11 THE COURT: Well, you don't know. The others said  
12 they didn't -- they didn't say they disagreed with Judge  
13 Gregory in that respect.

14 MS. O'SHEA: They elected not to reach the issue.

15 THE COURT: Right.

16 MS. O'SHEA: But I wanted to address, though, Your  
17 Honor, the two Court of Appeals cases that were brought up  
18 from the Virginia Court of Appeals.

19 THE COURT: Right.

20 MS. O'SHEA: The *Plummer* case was from 1991. And in  
21 1991, the statutory suspension mechanism gave the  
22 Commissioner the authority to suspend for fines and costs.

23 The statute was amended in 1994. So the version of  
24 the statute that was being construed by the Court of Appeals  
25 in 1991 included the Commissioner as a suspending entity.

1           The General Assembly took that out in 1994. And so  
2 to the extent that *Plummer* at all stands for the rather  
3 tenuous proposition that DMV is the suspending entity, the  
4 General Assembly changed the statute. So *Plummer* can no  
5 longer be considered good authority for that particular  
6 proposition.

7           The other Virginia Court of Appeals opinion that was  
8 cited was *Carew v. Commonwealth* from 2013. That case dealt  
9 with an administrative DMV suspension, a suspension that is  
10 done by DMV. And the DMV will admit that they do. So you  
11 can't take *Carew* out of context and say, based on *Carew*, now  
12 the Virginia Court of Appeals thinks that DMV does all  
13 license suspensions. That is too big of a stretch.

14           So, Your Honor, the Commissioner maintains, for all  
15 of the arguments that we raised initially and that we've  
16 raised now in this current iteration of the litigation, that  
17 he is immune from suit, that he's not the right person to  
18 have sued here.

19           And even setting aside that, *Rooker-Feldman* still  
20 applies, from the Commissioner's perspective, because they're  
21 still challenging an aspect of the initial Court order of  
22 conviction, and rather than doing that through the state  
23 courts, they've elected to bring it to the federal court  
24 system.

25           I mean, one of these plaintiffs, according to his

1 allegations in the complaint, Mr. Stinnie, the lead named  
2 plaintiff, was just convicted for driving on a suspended  
3 license. For a defense, rather than appealing that up  
4 through the Virginia state court systems and raising his  
5 arguments anew, he didn't. He's here in federal court.

6 THE COURT: Well, if you don't pay the fine, then  
7 you go back to the Court and ask the Court to reduce, give  
8 you a different payment plan, and you disagree with what the  
9 Court did, what's the procedure for appealing that?

10 MS. O'SHEA: For appealing the Court not changing  
11 the fine? Well, I think that you have to --

12 THE COURT: For not giving you a payment plan that  
13 you can get along with.

14 MS. O'SHEA: I don't know that you can appeal the  
15 payment plan, but what you can appeal is your criminal  
16 sentence at the time it's given.

17 I mean, in Mr. Stinnie's case, a jury elected to  
18 find him --

19 THE COURT: Well, that seems to be the problem. The  
20 defendant may think he's able to pay at the time, he's  
21 waiting for a payday loan on Saturday or he's going to -- you  
22 know, expecting a bonus or a gift over the weekend, and then  
23 that doesn't come through.

24 Can they -- you know, I guess you've got ten days.  
25 You used to have ten days to appeal. But anyway, after the

1 appeal time has gone by, something might intervene and he's  
2 not able to pay. I don't see that that -- doesn't seem he  
3 has any appeal from that.

4 MS. O'SHEA: He could, under Virginia state law  
5 precedent, file a petition for modification.

6 THE COURT: Right.

7 MS. O'SHEA: And if the Court denied the petition  
8 for modification, then there is a denial of a request that  
9 would form the basis for a resulting appeal.

10 THE COURT: Good luck on getting a lawyer that would  
11 be cheaper than paying the fines and costs.

12 MS. O'SHEA: It could be, but that doesn't mean that  
13 remedy is not there.

14 THE COURT: Right.

15 MS. O'SHEA: If you've got a problem with the way  
16 the courts are structuring the payment plans, you need to  
17 raise that in the courts and give the Virginia state courts a  
18 chance to fix that.

19 You heard testimony from the two court clerks today  
20 that it's different across the Commonwealth. Different court  
21 clerks are going to offer different payment plans and they're  
22 going to administer them in different manners. And to the  
23 extent that there's a problem with the way in which the  
24 payment plans are offered and administered, that's an issue  
25 that needs to be taken up with the courts and the court

1 clerks.

2           The Commissioner doesn't even know how much money  
3 people owe in fines and costs. He has no idea if a payment  
4 plan has been offered or has been appropriately structured.

5 That's not --

6           THE COURT: At this point, though, if the -- he  
7 knows what the process is, and if the process is  
8 unconstitutional on its face, then -- in particular, on its  
9 face, then he would not -- he couldn't enforce an  
10 unconstitutional process, or should not.

11           MS. O'SHEA: Well, he's not enforcing it.

12           But to the broader question, the statute is not  
13 unconstitutional on its face. In order to make a facial  
14 challenge to a statute, you have to show that the statute  
15 cannot be constitutional under any application.

16           And all the plaintiffs said in a footnote in their  
17 complaint that they were bringing a facial challenge to the  
18 statute. In argument today they seem to have conceded that  
19 there are circumstances under which the statute can operate  
20 constitutionally, meaning when someone who has the ability to  
21 pay and deliberately fails to do so has their license  
22 suspended. They haven't raised any sort of plausible  
23 argument that that scenario would violate the Constitution.

24           THE COURT: Well, why wouldn't even that person be  
25 entitled to notice and the right to be heard?

1 MS. O'SHEA: They get notice. They have notice.

2 In fact, Ms. Johnson testified today that she knew  
3 that if she didn't pay her fines and costs, her license was  
4 going to be suspended. Notice is --

5 THE COURT: Well, what's the right to be heard,  
6 then?

7 MS. O'SHEA: The right to be heard exists at the  
8 time of your criminal sentence. The right to be heard  
9 attaches --

10 THE COURT: Well, that's before you have the  
11 problem.

12 MS. O'SHEA: "Before you have the problem" meaning  
13 your inability to pay fines and costs?

14 THE COURT: Right.

15 MS. O'SHEA: There's an ability to be heard and a  
16 mechanism that the Virginia General Assembly has set up in  
17 the statutes that says that you can petition for  
18 modification, that says that you can go to the Court after  
19 the fact and say, hey, I can't afford this, I need a change.

20 The Virginia Supreme Court enacted in Rule 1:24, and  
21 that the General Assembly codified just last year, that you  
22 have the opportunity to be heard, and that opportunity is in  
23 the courts. The opportunity is not before the DMV  
24 Commissioner, who has no ability or authority to convene a  
25 pre-deprivation or post-deprivation ability-to-pay hearing

1 with respect to fines and costs, that he doesn't even know  
2 how much they are. That's not his role. That's not his  
3 bailiwick. This is not an issue that he can redress.

4 I'm happy to talk more about the specifics of the  
5 equal protection analysis or the procedural due process  
6 analysis, if the Court wishes. I've spelled it all out in  
7 the briefs, Your Honor.

8 THE COURT: Yeah.

9 MS. O'SHEA: I did want to note with respect to the  
10 out-of-circuit precedents that have been cited by the  
11 plaintiffs, the cases from Tennessee, the case from Michigan,  
12 the Tennessee cases have been stayed pending appeal. That  
13 case is notable in that the DMV -- the Tennessee statute for  
14 suspension for nonpayment of fines and costs, the person who  
15 suspends there is the Commissioner; and that's why they sued  
16 the Commissioner of the DMV, because that's what the  
17 Tennessee statute says.

18 It's the same in Michigan. In Michigan, the  
19 Secretary of State suspends for nonpayment of fines and  
20 costs. And so the Court in Michigan, in a suit brought  
21 against the Michigan Secretary of State, said, well, the  
22 Secretary of State needs to have some sort of ability-to-pay  
23 hearing.

24 So those cases are distinguishable from these  
25 circumstances both in that it deals with different statutes

1 and in that the person who is responsible for the enforcement  
2 mechanism and the determination of the ability to pay was, in  
3 fact, before the Court. And that's not what we have here.

4                 By contrast, I did want to point out that the  
5 Eleventh Circuit recently affirmed Florida's statute, very  
6 similar to Virginia's, against a due process challenge that  
7 was raised in that jurisdiction. And that Eleventh Circuit  
8 Court case is *Evans v. Rhodes*. We had cited to an earlier  
9 version of it, but now it was affirmed earlier this year.  
10 And the cite for the Eleventh Circuit case is 735 Federal  
11 Appendix 986.

12                 So the Eleventh Circuit, to my knowledge, is the  
13 first federal Court of Appeals to address this issue. They  
14 addressed it and they affirmed the judgment of the district  
15 court that upheld the Florida statute against a very  
16 analogous due process that was brought by courts -- brought  
17 in courts in that jurisdiction.

18                 Just briefly touching on the irreparable harm  
19 question, this Court should not presume irreparable harm,  
20 particularly not as to an entire class of individuals who are  
21 not before the Court.

22                 For example, Ms. Johnson, who came up and testified  
23 today, said that she is being irreparably harmed because she  
24 might be able to get other jobs that might pay her more, but  
25 I would note that she has not applied for a restricted

1 license, which is available to her under the terms of  
2 Virginia law. And I would also note she also testified that  
3 she has other miscellaneous expenses, like a \$100 phone fee,  
4 that could easily be taken and applied to a court payment  
5 plan.

6 So I would hesitate to presume irreparable harm in  
7 this particular context. And I think that the Fourth Circuit  
8 has expressly said that you don't presume irreparable harm,  
9 even in a constitutional context, outside of cases involving  
10 the First Amendment and the Fourth Amendment right to privacy  
11 in your home.

12 So the bottom line on irreparable harm, they're  
13 basically just alleging economic injuries; and that, by its  
14 very definition, is not irreparable.

15 With respect to the public policy prong of the  
16 injunction analysis, I wanted to note that if this Court  
17 says, hey, Commonwealth of Virginia, Department of Motor  
18 Vehicles, whatever entity is bound by this particular Court  
19 order, you can no longer enforce Code Section 46.2-395, you  
20 can't do it, Virginia basically would be left with no  
21 enforcement mechanism as to its fines and costs.

22 Despite what the plaintiffs argue, the only other  
23 alternative that would be available would be a show cause,  
24 leading to incarceration. Incarceration is surely a much  
25 harsher measure. And I believe the United States Supreme

1 Court has said that you can't incarcerate where someone  
2 refuses to pay fines -- or cannot pay fines and costs and is  
3 indigent, that you're implicating their liberty interest at  
4 that point.

5 THE COURT: Well, what's wrong with if the only  
6 person you would incarcerate would be that one that willfully  
7 was not paying?

8 MS. O'SHEA: Because the Commonwealth still needs to  
9 have an enforcement. You have a line there between people  
10 who are willfully not paying -- okay, fine, incarcerate those  
11 individuals -- and individuals who claim that they can't pay.  
12 But there's a bit of a question mark associated with that.

13 THE COURT: Back in my time in state court, I mean,  
14 there was sort of an assumption that if someone didn't pay  
15 their child support, if you put them in jail, probably by the  
16 end of the week the family -- somewhere the money would show  
17 up. It wouldn't necessarily be from the person in jail, but  
18 all the family would feel bad and get together and pay it.

19 But that's not proper, to put people in jail in the  
20 hope that somebody will come along.

21 MS. O'SHEA: Well, I agree. And that's why  
22 incarceration is a last-ditch effort. That's not what the  
23 courts want to resort to doing, if they can.

24 THE COURT: Well, but here you're taking their  
25 property.

1 MS. O'SHEA: Which is a lesser measure.

2 THE COURT: Well, I know it, but you're taking their  
3 property when they cannot -- they cannot pay. They shouldn't  
4 be punished if they cannot pay.

5 MS. O'SHEA: I would argue it's not punishment, at  
6 least not in the constitutional context, when you take away  
7 someone's privilege to drive. That's not punishment. That  
8 is giving them --

9 THE COURT: Well, if you charge them an extra \$145,  
10 I mean, that's --

11 MS. O'SHEA: I don't know that you can call that  
12 punishment, either, Your Honor, at least not within the  
13 constitutional context.

14 THE COURT: Well, if it's keeping you from having  
15 your car --

16 MS. O'SHEA: My point, Your Honor, is that there are  
17 fact-finders, there are juries, that impose these fines, and  
18 they impose them for a reason, and they become part and  
19 parcel of a criminal order of conviction. And the  
20 Commonwealth of Virginia has an interest in continuing to  
21 have some enforcement mechanism to go with those fines that  
22 have been assessed by the juries, by the voices of the people  
23 who live in the Commonwealth of Virginia.

24 The Court shouldn't strip them of what is one of  
25 their only ways of trying to incentivize people to comply

1 with these Court orders, because otherwise, the only option  
2 that's going to be left to the Court is incarceration. And  
3 nobody wants that.

4           So I also wanted to note, Your Honor, that enjoining  
5 the Commissioner from updating DMV transcripts -- because  
6 that's basically what that would be. It would be saying,  
7 record-keeper, when you get a suspension notice from the  
8 court, don't put it in your system. It's not going to stop  
9 the courts from issuing those orders. And the plaintiffs  
10 admitted as much. The injunction they're seeking, then,  
11 isn't tailored to the actual outcome they want. Not having  
12 updated DMV transcripts isn't going to change the fact that  
13 these licenses have been suspended for nonpayment of fines  
14 and costs. It's not going to stop the Commonwealth from  
15 being able to charge these individuals with driving on a  
16 suspended license. All it's going to change is the type of  
17 proof that is offered in those conviction proceedings.  
18 Rather than being a DMV transcript, you're going to get  
19 certified Court orders. It's not going to change anything.

20           I would note, to the extent that the plaintiffs have  
21 asked this Court to order full restoration of the five  
22 plaintiffs' driver's licenses, two of the plaintiffs have  
23 their driver's licenses; they're not suspended right now.  
24 Well, actually, one is not suspended and the other has a  
25 learner's permit. It's not clear that he ever even had a

1 valid driver's license. And that would be Williest Bandy  
2 from Norfolk.

3 With respect to the other three, if the Court is  
4 entertaining this at all, then I would submit that there  
5 would be need to be some inclusion in the Court order for  
6 restoration only to the extent that they are otherwise  
7 eligible, because I don't know -- for example, they might  
8 have enough points on their license or other things outside  
9 the context of fines and costs that would also bar them from  
10 having a valid driver's license.

11 THE COURT: Well, the Court couldn't do anything but  
12 what's connected with this case. If they can't drive for  
13 other reasons, that's --

14 MS. O'SHEA: I understand.

15 THE COURT: -- that's not --

16 MS. O'SHEA: But to the extent that they've asked  
17 for a broad injunction, saying nobody should be suspended in  
18 the future for payment of fines and costs, period, like,  
19 starting now, moving on, DMV, if you get these orders, don't  
20 update the transcripts, I would submit that that's not  
21 narrowly tailored to the issues present in this particular  
22 dispute. That's saying under no circumstances, regardless of  
23 ability to pay versus, you know, just inability to pay, don't  
24 enforce the statute. And that's overbroad. It paints too  
25 far.

1           Ultimately, Your Honor, it's the plaintiffs' burden  
2 of showing entitlement to a preliminary injunction. And  
3 they're asking for extraordinarily equitable relief, and they  
4 need to show that they are likely to succeed on the merits  
5 and all of the other elements that go part and parcel with a  
6 preliminary injunction. They have not. They have not met  
7 their burden.

8           The injunction would be ineffective. It would not  
9 stop the suspension orders from coming. It would presumably  
10 bind or affect parties who are not before the Court to state  
11 their interests, like the court clerks, who are involved in  
12 all of this very intimately at the clerk's office.

13           Now, I will certainly concede from a personal  
14 perspective, if not from that of the Commissioner, that there  
15 may very well be more effective ways to handle this problem.  
16 I get that. I think the Court gets that. I think everybody  
17 sitting in this courtroom gets that. But the fact that there  
18 might be more effective ways, from a policy perspective, of  
19 handling the issue of indigent individuals who cannot pay  
20 their fines and costs does not mean that they are entitled to  
21 the preliminary injunction they seek.

22           Their arguments should be for the General Assembly.  
23 Their economic experts should go to the General Assembly and  
24 talk to the General Assembly or, at the very least, bring  
25 these issues up through the state courts, who would be

1 empowered to actually address this issue.

2 As before this Court, this federal court is not the  
3 appropriate forum. This defendant, the Commissioner of the  
4 DMV, is not the appropriate defendant.

5 This Court should -- in the exercise of its  
6 discretion, the Court should stay its hand, let the case  
7 develop, and deny the request for a preliminary injunction.

8 THE COURT: All right. Thank you.

9 MR. BLANK: We're way over time, Judge, so I'm going  
10 to be brief. I'm not going to address all the things, but I  
11 do want to address two specific points. It really ends where  
12 we started.

13 THE COURT: Let me ask you one thing.

14 MR. BLANK: Yes, sir.

15 THE COURT: Does the Court have to first decide not  
16 likely to prevail and that sort of thing? With regard to the  
17 jurisdictional issues, does the Court have to decide that the  
18 case -- jurisdictionally the case can proceed?

19 MS. CIOLFI: Judge, I don't think so, because that's  
20 not actually before you today. The preliminary injunction is  
21 before you. Their jurisdictional issues are not.

22 THE COURT: Well, but if I don't have jurisdiction,  
23 I mean, that -- is there any law, I mean, what --

24 MR. BLANK: Your Honor, it may be the case where you  
25 order the injunction and then say, I want to then, you know,

1 go to a jurisdictional hearing and deal with the  
2 jurisdictional issue. But I don't -- again, at this point in  
3 time, that issue is not before you.

4 THE COURT: Okay.

5 MR. BLANK: If we're going to deal with that, we can  
6 deal with it, but I don't think you have to deal with that up  
7 front. I agree with you jurisdiction is always the issue,  
8 but that's not what is at issue in this hearing.

9 THE COURT: Okay.

10 MR. BLANK: Again, if there's immediate need and  
11 irreparable harm, you can stop the practice; and then if they  
12 come back and raise this issue on jurisdiction, we can  
13 address it.

14 But, Judge, again, I want to deal with two quick  
15 issues. One is where we started -- sort of where we ended  
16 with Judge Gregory in the Commonwealth and where we started  
17 with Ms. Ciolfi today, and it's the "it's not me" argument.  
18 They want to say, it's not me; it's the clerks, it's the  
19 payment plan, it's the judges. That's just not -- that's not  
20 true and it's not required. And first I want to say what's  
21 not true.

22 There's not a shred of evidence before you that  
23 there are orders by the Court to suspend the licenses for  
24 failure to pay. There's not a shred of evidence. They  
25 didn't bring it. We had a circuit court clerk say that it

1 didn't happened. We had a district court clerk say there's  
2 no orders. We had Ms. Ford say she didn't see any orders.  
3 We had before you the auditor of public accounts say that the  
4 DMV suspends. We have four district court websites to say  
5 it's the DMV. And we have no Court orders.

6 And you -- again, Judge, back in the Court of  
7 Appeals, and we cited to it, *McBride versus Commonwealth of*  
8 *Virginia*, and it's time-honored, a Court speaks through its  
9 orders and those orders are presumed to be accurate.

10 There is no Court order, so this idea when she --  
11 when my learned opposition stands up and says, it's not the  
12 DMV, it's the Court, the Court orders, Courts speak through  
13 orders, and there are no orders. And there's not a scintilla  
14 of evidence that there's orders here.

15 What we have is a DMV that is directly involved in  
16 the license suspension for failure to pay court debts and  
17 fines. You can say the court has something to do with it, as  
18 Ms. Ciolfi said; you can say the DMV has all of it; but you  
19 cannot say that the DMV is not involved in license  
20 suspension.

21 And I made the point on cross -- again, it may have  
22 seemed silly at the time, but I didn't think it was silly --  
23 it doesn't happen without the DMV. And the computers don't  
24 talk to each other without the DMV. And the convictions  
25 don't get abstracted without the DMV. And the \$145 doesn't

1 get collected without the DMV. And the suspension doesn't  
2 happen without the DMV.

3 The DMV is involved. You can say how much, but you  
4 cannot refute that they are involved. And without a Court  
5 order, without any evidence of a Court order, and with all  
6 the evidence that we put in from the public record that it is  
7 the DMV, again, that issue shouldn't even be on the table in  
8 terms of the order that you can enter.

9 And go back to the last two points. There's not a  
10 hint of due process, not a hint of it, with regard to that  
11 time of default. It's just not there. There's nobody asking  
12 the question of the ability to pay. It doesn't exist. The  
13 default happens. There's no due process. It's not fair.

14 It shouldn't be -- in America, it shouldn't be -- if  
15 it's not constitutional, this Court should stop that process.  
16 And our order that we request is narrowly tailored to that.

17 "During the pendency of the action, the Commissioner  
18 is enjoined from enforcing Section 46.2-395 against  
19 plaintiffs and future suspended class members unless and  
20 until defendant or another entity determines through a  
21 hearing, with adequate notice, that their failure to pay was  
22 willful."

23 That doesn't exist with what we've got right now.  
24 She says that they should do it at the time of conviction.  
25 There isn't even -- as you said, they could be waiting for

1 the payday loan. It's 30 or 41 days down the path. That is  
2 not the time. The time is T2. And until we have a system  
3 that says that that inability to pay versus willfulness to  
4 pay, then you do not have a hint of due process. We are  
5 likely to prevail on its merits. And the other issues and  
6 the other elements, if you look at the totality of the  
7 evidence that we presented today, is overwhelmingly in the  
8 favor of the plaintiffs.

9           We ask you to enter this injunction. Stop this  
10 process now. It is unconstitutional.

11 Thank you, Your Honor.

12 THE COURT: All right. Thank you all. We'll recess  
13 court.

14 THE MARSHAL: All rise.

15 || (Proceedings adjourned, 6:01 p.m.)

16 || CERTIFICATE

17 I, JoRita B. Meyer, certify that the foregoing is a  
18 correct transcript from the record of proceedings in  
19 the above-entitled matter.

20 /s/ JoRita B. Meyer

Date: 11/19/2018

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Hon. Marshall Ferguson

With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

## STATE OF WASHINGTON.

Plaintiff,

V.

11 THE KROGER CO.;  
12 ALBERTSONS COMPANIES, INC.;  
13 ALBERTSON'S COMPANIES  
14 SPECIALTY CARE, LLC;  
ALBERTSON'S LLC;  
ALBERTSON'S STORES SUB LLC;  
and KETTLE MERGER SUB, INC..

### Defendants.

No. 24-2-00977-9 SEA

REPLY IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS

REPLY IN SUPPORT OF DEF'S. MOTION TO DISMISS

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## I. INTRODUCTION

The State’s Response concedes that this action is the first time in history that a State has sought to enjoin a nationwide merger under state antitrust law. Mot. 1-2. The State’s suggestion that the Complaint’s requested relief is “commonplace,” Resp. 8, and that Defendants’ arguments “have previously been considered and rejected,” Resp. 2, is belied by the State’s failure to cite *any* precedent in which *any* state sought similar relief. The Response thus confirms that the State seeks to usher in a new age of merger enforcement, in which any state attorney general has license to enjoin any out-of-state transaction under state law without regard to its nationwide impacts. Resp. 2. This Court should reject the State’s unprecedented overreach.

Rather than confronting the serious legal issues raised in Defendants' Motion and the consequences of the State's heavy-handed approach, the Response largely attacks strawman arguments about preemption, declaratory relief, and the scope of the Consumer Protection Act ("CPA").

17        *First*, the State offers no real defense of the disproportionality between its allegations  
18 of Washington-specific harm and its request for nationwide injunctive relief. Although the  
19 State resists the label of “nationwide injunction,” Resp. 14-15, it concedes that it seeks to  
20 prohibit the merger in all 50 states. On these facts, the State cannot show that the sweeping  
21 relief sought—which would enable one state to dictate merger policy for the entire country—is  
22 appropriately tailored to the alleged harm.

24       ***Second***, the State fails to address the significant constitutional and comity concerns with  
25 its requested relief. The U.S. Supreme Court’s balancing test under the Dormant Commerce  
26 Clause, as articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is binding precedent.

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1 The State’s perfunctory *Pike* analysis, Resp. 22-23, cannot overcome the clear imbalance  
2 between the Complaint’s Washington-specific allegations and the extraterritorial effects of its  
3 requested relief in all other states. And the State’s refusal to even *acknowledge* the multiple  
4 parallel actions challenging the merger on the same grounds and seeking the same relief, Mot. 5,  
5 underscores its failure to rebut Defendants’ Full Faith and Credit and comity arguments.

7       ***Third***, the State’s so-called “express lane” to avoid the merits of the Motion by focusing  
8 on possible relief *other than* a nationwide injunction, Resp. 2, is a road to nowhere. The only  
9 tangible, non-advisory relief the Complaint actually seeks is an order enjoining the merger  
0 across the country. That relief is impermissible.

1        ***Finally***, dismissal would not prejudice the State or its ability to act on behalf of  
2 Washingtonians. The FTC, eight other states, and the District of Columbia jointly sued to  
3 enjoin this same transaction under the Clayton Act, *see FTC v. The Kroger Co.*, No. 3:24-cv-  
4 347 (D. Or.) (“FTC Action”), and Defendants have invited the State to join that suit, which does  
5 not suffer from the legal infirmities raised here. *See* Defs.’ Mar. 29, 2024 Letter to R. Ferguson  
6 (Ex. A). Joining the FTC Action—which is consistent with long-standing practice and  
7 constitutional limitations regarding merger litigation—would enable the State to litigate this  
8 nationwide merger while appropriately considering the interests of Washingtonians and  
9 conserving taxpayer resources.

## II ARGUMENT

#### A. The State's Proposed Injunction Is Disproportionate to the Alleged Harm

The State agrees that “[i]njunctions must be tailored to remedy the specific harms shown,” Resp. 12 (quoting Mot. 9), but refuses to apply that rule.

The State confuses the merger itself, which is a contract between out-of-state companies

1 governed by Delaware law, and the merger’s predicted *effects*, which are nationwide. Resp. 15.  
 2 As the merger itself will be consummated out-of-state, *see* Resp. 8, the State has authority to  
 3 address only the *effects* of the merger within Washington. Mot. 7-8.

4 The State’s requested relief far exceeds that narrow mandate. Although it resists the  
 5 “nationwide injunction” label as a “red herring,” Resp. 14, the State does not dispute that its  
 6 requested injunction would have nationwide effect. The State’s requested relief would thus  
 7 dictate merger policy for the entire country based on alleged harm in Washington alone. Such  
 8 sweeping relief would exceed both the State’s own mandate and that of this Court. *See, e.g.,*  
 9 *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (rejecting nationwide  
 10 injunction where harm alleged was “not shared nationwide”).

11 The State misses the point of Defendants’ divestiture arguments, which highlight the  
 12 overbroad relief sought. Mot. 9-10. Of course, divestiture is not *always* an appropriate remedy  
 13 in merger cases.<sup>1</sup> But the State does not dispute that a Washington-specific divestiture would  
 14 be *more tailored* to address its alleged Washington-specific harms. Resp. 14-18. The  
 15 Complaint’s fatal flaw is the State’s *insistence* on nationwide relief against the *entire*  
 16 transaction, rather than state-specific relief. Resp. 15. That requested remedy is plainly “more  
 17 burdensome to the defendant than necessary to provide complete relief to the plaintiff[.]”  
 18 Mot. 7 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

19       **B. The State’s Requested Relief Contravenes the U.S. Constitution**

20       Contrary to the State’s distortions, Defendants’ Motion presents an *as-applied*  
 21 constitutional challenge to the State’s novel lawsuit, Mot. 10-13, not a facial attack on the CPA,  
 22 *contra* Resp. 4. The State’s defense of the CPA *generally* fails to confront Defendants’ *actual*  
 23 arguments for dismissal, much less rebut them.

24  
 25  
 26       

---

<sup>1</sup> Divestiture as a court-ordered *remedy* after trial is different from the contractual divestiture in  
 this case, which must be addressed at the liability phase. *See Illumina, Inc. v. FTC*, 88 F.4th  
 1036, 1057 (5th Cir. 2023).

1       ***First***, the State’s response to Defendants’ actual argument—a straightforward as-  
 2 applied Dormant Commerce Clause challenge under *Pike*, Mot. 10-12—consists of two  
 3 conclusory paragraphs declaring the issue premature. Resp. 22-23. The State fails to address  
 4 the reality that the merger’s alleged effects in Washington, even if proven, cannot outweigh the  
 5 extraterritorial effects of a nationwide injunction in all other states. Mot. 9-10. The State  
 6 refuses to engage with Defendants’ authority explaining as much, including *Allergan, Inc. v.*  
 7 *Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013), and *Hyatt Corp. v. Hyatt Legal*  
 8 *Services*, 610 F. Supp. 381, 385 (N.D. Ill. 1985), which are directly on point. Mot. 11.

9       ***Second***, the State wrongly suggests that *Pike* was overruled. Resp. 22. Although a  
 10 plurality in *Pork Producers* sought to narrow *Pike*, the *majority* of the Supreme Court disagreed.  
 11 See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 402 (2023) (Roberts, J., concurring).  
 12 *Pike* is binding precedent, and “the extraterritoriality analysis [is a] facet[] of the *Pike* test.”  
 13 *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 719 (2007). Under *Pike*, the extraterritorial effects  
 14 of the State’s proposed remedy are “clearly excessive” compared to any Washington-specific  
 15 effects. Mot. 11-12.

16       ***Third***, the State’s assertion that *Washington Bankers Association v. State*, 198 Wn.2d  
 17 418, 452 (2021), eliminates *Pike* is incorrect. The parties in *Washington Bankers* “d[id] not  
 18 contest *Pike*’s applicability,” and *Washington Bankers* involved a *facial* challenge to a tax law,  
 19 not an enforcement action seeking nationwide relief. *Id.* Thus, the State’s suggestion that  
 20 *Washington Bankers* “made clear” that *Pike* does not apply to facially neutral laws, Resp. 22,  
 21 is simply wrong.

22       ***Fourth***, the State overreads *State v. Sterling Theatres Co.*, 64 Wn.2d 761 (1964), which  
 23 addressed a broad preemption argument that businesses with sufficient interstate activities were  
 24 categorically “exempt from the scope of the state law.” *Id.* at 765. The actual enforcement  
 25 action at issue in *Sterling* was focused on theaters *in Seattle*—a “primarily local impact.” *Id.*  
 26 at 764. Here, Defendants raise no facial challenge to the CPA and do not seek to limit the

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1 State's authority to enforce the CPA *within its own borders*. *Contra* Resp. 20-21. With *Sterling*  
 2 properly framed, the State's suggestion that the U.S. Constitution does not apply to "state  
 3 antitrust law," Resp. 18-21, offends basic rules of federalism.

4       **Finally**, the State's argument that the Full Faith and Credit Clause should not apply  
 5 without a judgment, Resp. 23, ignores that its requested injunction conflicts with other state  
 6 laws and would prohibit other courts' consideration of the merger under those laws (or  
 7 applicable federal law). A state may not "project its laws across state lines so as to preclude  
 8 the other from prescribing for itself the legal consequences of acts within it." Mot. 12 (quoting  
 9 *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939)); *see*  
 10 *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235-36 (1998) (invalidating extraterritorial  
 11 injunction against witness testifying). The State does not dispute that the merger is *lawful* under  
 12 other states' laws, Resp. 24, yet it asks this Court to prohibit other courts from making that  
 13 judgment.

14       **C. Interstate Comity Precludes the State's Action**

15       The State does not acknowledge the elephant in the courthouse: the FTC Action  
 16 involving nine attorneys general. Mot. 5. Nor does the State contest that it could bring an  
 17 identical claim under the Clayton Act, or that the FTC Action provides an efficient forum for  
 18 all interested parties (including the State) to be heard. Mot. 13-14. Yet the State persists in this  
 19 unprecedented action, without regard to constitutional limitations, potentially inconsistent court  
 20 rulings, and the significant practical concerns arising from this unnecessary parallel proceeding.  
 21 In short, the State's position flouts basic principles of interstate comity.

22       **D. The State's Purported Alternative Remedies Cannot Save the Complaint**

23       The State's focus on *other* possible remedies—divestiture and declaratory relief—  
 24 cannot salvage its impermissible request for nationwide relief. Resp. 11. At most, the State's  
 25 arguments would yield a partial dismissal or an order striking the request for nationwide  
 26 injunctive relief, not denial of Defendants' Motion. *See Perez v. Leprino Foods Co.*, 2018 WL

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1 1426561, at \*3 (E.D. Cal. Mar. 22, 2018) (noting overlap between striking and dismissing  
 2 improper relief). Regardless, neither alternative remedy is permissible.

3 ***First***, although the State argues that the possibility of divestiture should save the  
 4 Complaint, Resp. 9, the State has not sought any state-specific relief, including a divestiture.  
 5 This case should not proceed on a hypothetical divestiture the State has not requested.

6 ***Second***, the State's reliance on declaratory relief as a standalone remedy likewise fails.  
 7 Where "no monetary or injunctive relief is available" and a declaratory judgment would not  
 8 independently remedy the alleged injury, a plaintiff "lacks standing to assert any remaining  
 9 claims for declaratory relief." *Karl v. City of Bremerton*, 7 Wn. App. 2d 1047, 2019 WL  
 10 720834, \*6 (2019). Because the State alleges the *only* relief that would redress its claimed  
 11 injury is a nationwide injunction, the State "lacks standing to assert any remaining claims for  
 12 declaratory relief." *Id.*

13 The State's reliance on *State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 82  
 14 Wn.2d 265, 276 (1973), is misplaced. That case involved *injunctive* relief, and the declaratory  
 15 relief at issue was expressly in service of *other* private lawsuits. *Id.* Those real-world  
 16 implications are absent here.

### 17 III. CONCLUSION

18 Defendants respectfully request that this Court dismiss the Complaint.

19 DATED this 17th day of April, 2024.

20 Respectfully submitted,

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7	Brendan T. Mangan
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9 DATED this 17<sup>th</sup> day of April, 2024.

10 s/ Pallavi Mehta Wahi  
11 Pallavi Mehta Wahi  
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# Exhibit A

# Arnold & Porter

March 29, 2024

**VIA EMAIL**

Robert W. Ferguson  
*Attorney General of the State of Washington*

Jonathan Mark  
*Senior Assistant Attorney General*  
*Antitrust Division Chief*

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800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

Re: *Washington v. The Kroger Co., 24-2-00977-9 SEA (Wash. Super. Ct.):*  
*Defendants' Request for Joint Proceedings*

---

Mr. Attorney General:

Because the above-captioned case is one of three government enforcement actions seeking to enjoin The Kroger Co.'s acquisition of Albertsons Companies Inc. on a nationwide basis, we ask that you consider consolidating your case (the "Washington Case") with the federal case brought by the Federal Trade Commission ("FTC"), eight states, and the District of Columbia: Compl., *FTC v. The Kroger Co.*, No. 3:24-cv-00347-AR (D. Or.) (the "Federal Case") by joining as a plaintiff in the Federal Case.



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The Federal Case has been scheduled for a hearing on plaintiffs' motion for injunctive relief between August 26 and September 16, 2024, while the Washington Case is not scheduled to begin until September 16. Litigating all antitrust challenges to the Kroger-Albertsons merger in a single proceeding will benefit all parties, save millions of dollars in taxpayer money, avoid unnecessary and duplicative litigation, and ensure a final resolution of all critical issues in a timely manner. Below are a few additional reasons why we believe you should accept our proposal and agree to consolidation and join as a plaintiff in the Federal Case.

**First**, the issues raised in the Washington case overlap completely with those raised in the Federal Case. Specifically, the Federal Case seeks to represent the citizens of the entire United States, including the citizens of Washington. The Federal Case alleges that the proposed Transaction will likely cause anticompetitive harm in Washington. *See, e.g.*, Fed. Compl. ¶¶ 52, 80. And the Federal Case relies on the same legal principles as the Complaint in your case. In fact, as the Complaint in the Washington Case acknowledges, Washington law generally *requires* Washington courts to follow federal law unless there is a specific basis to depart from that law. Compl. ¶ 64; *see State v. LG Elecs., Inc.*, 185 Wash. App. 123, 134, 340 P.3d 915, 920 (2014) (“[D]eparture from federal law . . . must be for a reason rooted in [Washington’s] own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression.” (citation omitted)). In short, because both the Washington Case and the Federal Case require a court to determine the competitive effects of a merger that has not yet closed, the factual and legal issues in both cases are materially identical.

Washington will, of course, be free to raise any factual or legal arguments that it believes are unique to it in the joined case. But to the extent that you believe there are any material factual or legal distinctions between the Washington Case and the Federal Case, we ask that you state them specifically in response to this letter.

**Second**, duplicative litigation would impose unnecessary burdens on Washington taxpayers. Litigation is expensive, and Washington’s legal fees are likely to be particularly expensive given that it has hired Munger Tolles & Olsen LLP, a California law firm with rates exceeding \$1,000 per hour, per attorney. Indeed, given the extensive discovery and trial preparation process that will have to take place on an extremely expedited timeframe, the costs that Washington taxpayers will have to bear for the State’s litigation are certain to be significant. Coordination with the FTC and other states in the Federal Case, by contrast, will allow Washington to benefit from splitting the costs of investigating the matter and preparing for trial, thereby reducing the time and taxpayer money Washington will have to spend litigating this case.

**Third**, Washington will suffer no prejudice as a result of consolidation. Indeed, eight other states and the District of Columbia have already joined the FTC challenge, demonstrating that coordination among the states and the FTC is feasible and efficient. Those states have pooled their

# Arnold & Porter

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resources and coordinated their efforts to litigate *nationwide* issues in a single *nationwide* case on behalf of all consumers *nationwide*. If Washington were to join the Federal Case, it would be able to raise any arguments and evidence that it sees fit, and it would not be prejudiced by a single consolidated proceeding. Again, to the extent Washington believes it has unique legal or factual arguments, it would be free to raise those arguments in a consolidated proceeding.

**Fourth**, Washington has already participated in coordinated investigative efforts with other government enforcers. Before filing the Washington Case, Washington served as liaison counsel for all the states investigating the proposed merger. In that role, Washington coordinated directly and effectively with the FTC and other states to distribute investigatory materials and develop strategy. Although Washington abandoned that formal liaison role when it chose to litigate on its own, you have nonetheless acknowledged the need to coordinate litigation between the Washington Case and the Federal Case. For example, you have agreed that the federal trial should proceed before the Washington trial. Insisting on separate litigation will only make coordination efforts more complicated.

**Fifth**, Washington has already expended significant unnecessary public and private resources by insisting on duplicative litigation against Kroger and Albertsons separate from other state attorneys general. In October 2022, Washington filed a lawsuit in Washington state court challenging Albertsons' payment of a Dividend to its shareholders, which Washington alleged was made in conjunction with the proposed Transaction. Around the same time, the attorneys general of California, Illinois, and the District of Columbia brought a materially identical challenge to the dividend payment in federal court in the District of Columbia. Washington refused to coordinate litigation efforts with those state attorneys general. As you are aware, the plaintiffs in both the Washington state and federal dividend cases eventually voluntarily dismissed their complaints after having their claims rejected at multiple levels of the state and federal judiciaries. But Washington's refusal to coordinate meant that it ended up spending three times as much time and energy on litigating a case that was entirely duplicative of other coordinated litigation, and which ultimately proved meritless.

For these reasons and others, the Washington Case should be joined or consolidated with the Federal Case to allow for a single streamlined proceeding that will avoid further duplicative litigation, alleviate unnecessary burdens on Washington state courts, and minimize further waste of Washington taxpayer resources. Although Washington may have been concerned that the FTC and the nine other attorneys general would not ultimately seek to enjoin the merger when Washington first filed its litigation in January of this year, there is no conceivable reason to keep litigating in Washington state court now that the Federal Case has been commenced. We are not aware of any case in history in which a state attorney general has decided to challenge a merger in parallel with a merger challenge from the federal government. We do not believe there is a reason to break new ground in this suit, particularly when the FTC and nine other attorneys general are



March 29, 2024

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litigating the same issues in the pending Federal Case.

**Finally**, as you know, in a suit by the Attorney General under the Washington Consumer Protection Act, the prevailing party “may recover the costs of said action including a reasonable attorney’s fee.” RCW 19.86.080. In *State v. Black*, 100 Wn.2d 793 (1984), the Washington Supreme Court recognized “the Attorney General has an important role to play in enforcing th[e] State’s antitrust laws,” but it nonetheless affirmed the imposition of costs and attorneys’ fees against the State in light of “the complexity of th[e] case, the enormous amount of time and energy spent in discovery and the duplicative nature of lawsuit,” specifically citing the fact that the “Attorney General need not have brought th[e] suit as an identical civil action was filed [in federal court].” *Id.* at 806. If Washington refuses to join the Federal Case and continues to insist on duplicative and unnecessary litigation, we hereby reserve our right to seek appropriate relief against Washington, including but not limited to attorneys’ fees.<sup>1</sup>

We would be pleased to discuss any questions or concerns you may have.

Sincerely,

/s/ Matthew M. Wolf  
 Matthew M. Wolf  
 Sonia Kuester Pfaffenroth  
**Arnold & Porter Kaye Scholer LLP**

/s/ Mark A. Perry  
 Mark A. Perry  
 Luna Ngan Barrington  
**Weil, Gotshal & Manges LLP**

*Counsel for The Kroger Co.*

/s/ Enu Mainigi  
 Enu Mainigi  
**Williams & Connolly LLP**

---

<sup>1</sup> Because your litigation is entirely duplicative of the Federal Case, Washington is unlikely to be able to recover attorneys’ fees for its litigation efforts, even if it were to prevail. *See, e.g., Black Lives Matter Seattle-King Cnty. v. Seattle Police Dep’t*, 516 F. Supp. 3d 1202, 1213 (W.D. Wash. 2021) (excluding “those hours that are not reasonably expended because they are ‘excessive, redundant, or otherwise unnecessary.’”) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

**Arnold & Porter**

March 29, 2024

Page 5

/s/ *Edward D. Hassi*

Edward D. Hassi

**Debevoise & Plimpton LLP**

/s/ *Michael G. Cowie*

Michael G. Cowie

**Dechert LLP**

*Counsel for Albertsons Companies, Inc.*

**State of Wash. v. Texaco Refining and Marketing Inc., Not Reported in F.Supp. (1991)**

1991 WL 47081, 1991-1 Trade Cases P 69,345

1991 WL 47081

United States District Court, W.D. Washington.

The STATE OF WASHINGTON

v.

TEXACO REFINING AND MARKETING INC. and  
Shell Oil Co.

No. C91-39R.

|

Jan. 11, 1991.

## Temporary Restraining Order and Order Setting Trial

**ROTHSTEIN**, Chief Judge.

\*1 This Matter comes before the court on plaintiff's motion for a temporary restraining order and order to show cause. Having reviewed the motion, together with all documents filed in support and in opposition, having heard oral argument and being fully advised, the court finds and rules as follows:

Plaintiff State of Washington ("State"), through its Attorney General Kenneth O. Eikenberry, brings this motion for a temporary restraining order and order to show cause for preliminary injunction to enjoin consummation of a transaction which the State believes will violate federal antitrust law and will lead to irreparable harm to the State and its residents. The transaction at issue is the proposed acquisition by defendant Texaco Refining and Marketing, Inc. ("Texaco"), of all of the 55 service stations owned by defendant Shell Oil Company ("Shell") in Snohomish, King and Pierce counties within Washington. The transaction's sale price exceeds \$25 million. Unless otherwise ordered by this court, Texaco and Shell have announced they intend to close the transaction on Thursday, January 10, 1991.

*Discussion***A. Standard for Injunctive Relief**

**Section 26 of 15 U.S.C.** provides that any "person" may sue for injunctive relief under the antitrust laws, including § 7 of the Clayton Act. Washington, as a sovereign state of the United States, qualifies as a "person" under **15 U.S.C. § 26** and may sue in either its proprietary or *parens patriae* capacity for injunctive relief against any threatened loss or damage including damage to its general economy. *Hawaii v. Standard Oil Company of California* [1972 TRADE CASES ¶ 73,862], 405 U.S. 251, 257-262 (1972).

Section 16 of the Clayton Act authorizes the court to grant injunctive relief in cases involving unlawful acquisitions on the same conditions and principles that such relief is generally granted by courts in equity. This court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. *William Inglis & Sons v. ITT Continental Baking Co.* [1975-2 TRADE CASES ¶ 60,634], 526 F.2d 86, 88 (9th Cir.1975).

As a form of interlocutory relief, a court may issue a temporary restraining order to preserve the *status quo* until the court can consider an application for a preliminary injunction. 7 J. Moore, *Federal Practice*, 65.05 (1990); see e.g. *Smith v. Grady*, 411 F.2d 181, 186 (5th Cir.1969). Fed.R.Civ.P. 65(b) provides that a temporary restraining order may be granted if:

... it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition.

**B. Irreparable Injury**

\*2 After reviewing the evidence, the court concludes that the State would suffer irreparable injury if a temporary restraining order is not issued at this juncture. The first element of potential injury to the public is the immediate elimination of Shell as a competitive alternative in the market. Lessening of competition is recognized as the kind of irreparable injury that the interlocutory remedies under the Clayton Act were intended to prevent. See *United States v. BNS, Inc.* [1988-2 TRADE CASES ¶

**State of Wash. v. Texaco Refining and Marketing Inc., Not Reported in F.Supp. (1991)**

1991 WL 47081, 1991-1 Trade Cases P 69,345

[68,223\], 858 F.2d 456, 466 \(9th Cir.1988\).](#)

Defendants argue that interlocutory relief is inappropriate given the State's alternative remedy of pursuing a post-acquisition divestiture action. The court agrees that under certain conditions divestiture would be an alternate remedy. However, if the transaction were to be completed, the potential exists for Texaco to close some of the newly acquired service stations, or to make substantial modifications to the existing stations. Should this occur, these service stations would become substantially less desirable for acquisition by third parties. A loss in the attractiveness of the assets will potentially frustrate the court's ability to grant divestiture relief.

Since Texaco is unwilling to assure the court that no closures or modifications of current stations will be undertaken prior to trial, divestiture is not a feasible remedy in this case. Rather, interlocutory relief for the state is warranted to protect the public's interest from anti-competitive injury.<sup>1</sup>

Defendants have alleged that it is they, not the State, that will suffer irreparable injury if the pending acquisition is halted. This anticipated injury takes the form of loss of investment spent by the companies and dealers preparing for the changeover in ownership, and by the confusion and disruption of gasoline supply to the dealers. Defendants also allege that business good will may be lost for dealers that have told customers about the planned change in ownership. The court finds that the harm to defendants from this restraining order is minimal given that the current supply contracts between the Shell dealers and suppliers will be maintained by the court's order. Further, the court and parties are committed to a very accelerated trial schedule which will bring resolution of the suit within approximately a month.

#### C. Issuance of Bond

Texaco moves the court to require the State to post a bond pursuant to [Fed.R.Civ.P. 65\(c\)](#), which states:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Texaco requests a bond in the amount of \$533,000 per

month for the first two months.

\*3 The requirement and amount of a bond or other security in support of an injunction or restraining order is within the discretion of the district court, and will not be overturned unless an actual abuse of discretion is demonstrated. *California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, amended 775 F.2d 998 (9th Cir.1985). In deciding on a request for bond, the court looks at the possible harm to the enjoined party if the order is found unlawful, the likelihood of the applicant's success on the merits, the applicant's ability to post a substantial bond, and the possible adverse impact that requiring substantial security might have on the enforcement of rights created by remedial legislation. *Crowley v. Local 82, Furniture & Piano Etc.*, 679 F.2d 978, 999–1001 (1st Cir.1981). An attempt to enforce compelling public interests is a significant factor which must be addressed by a district court in considering this type of bond issue. *Id.* The *Crowley* court took note of the line of cases holding that no bond is required in suits to enforce important federal rights or "public interests." *Id.* at 1000; in accord, *Bass v. Richardson*, 388 F.Supp. 478, 490 (S.D.N.Y.1971); *California v. Tahoe RPA*, *supra* at 1325–26.

In other analogous cases, federal district courts have exhibited a continuing willingness to fashion equitable remedies for public relief with little or no security. See e.g., *Bass v. Richardson*, *supra*, (no bond required of New York to protect public interest because Congress had demonstrated its intent for vigorous private enforcement and bond might discourage such actions); *Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167 (D.D.C.1971), aff'd on other grounds, 458 F.2d 827 (D.C.Cir.1972) (security of \$100 required in face of \$750,000 to several million dollars damages claimed as result of injunction where higher bond would stifle intent to allow public interest suit).

Texaco cites *Squaxin Island Tribe v. Washington*, 781 F.2d 715 (9th Cir.1986) for the proposition that Rule 65(c) should not be extended to insulate the State from the requirement of posting bond. This case established that Washington state was not barred from collecting the security bond posted by an Indian tribe, typically subject to federal sovereign immunity. The court did not address the issue of whether the state should be required to post bond when bringing suit in its capacity of protecting the public interest.

The court has balanced the following factors in its decision on the requested bond: the relative harm to defendants as well as the fact that the matter should be

**State of Wash. v. Texaco Refining and Marketing Inc., Not Reported in F.Supp. (1991)**

1991 WL 47081, 1991-1 Trade Cases P 69,345

resolved in the very near future given that a trial date has been set within three weeks; the State's likelihood of success on the merits; and the fact that the state is financially not in the position to post a substantial bond at this time. The court has then factored into its finding the substantial public interest in the State's ability to pursue injunctive relief in this type of matter, which should not be impeded by the requirement of high bond. The court therefore declines to require the posting of a bond upon issuance of this order.

**\*4 Therefore, It Is Now Ordered As Follows:**

(1) Defendants Texaco, Shell and all persons acting on their behalf are restrained and enjoined from taking any action, either directly or indirectly, in furtherance of the intended acquisition by Texaco of 55 Shell gasoline service stations located in the Pierce, King and Snohomish county areas, including actions to close or otherwise consummate the acquisition;

(2) Shell Oil company dealer and jobber franchises and franchise relationships subject to the Petroleum Marketing Practices Act on January 9, 1991, shall be continued on the same terms and conditions pending further order of this court;

(3) The supply contracts, leases and other contracts between Texaco Refining and Marketing Inc. and the dealers scheduled to take effect on January 10, 1991, will not take effect until such time as this court further orders;

and

(4) The parties have agreed and stipulated that this temporary restraining order shall remain in full force and effect through the 4th day of February, 1991, at 9:30 am, at which time a trial will be conducted on the merits of this action and the court will determine whether this temporary restraining order shall be converted to a permanent injunction.

<sup>1</sup>

Defendants also object to the motion for temporary restraining order by asserting the doctrine of laches. Texaco argues that the state waited too long to act, and it would be inequitable to allow interlocutory relief at this late stage. The court is indeed frustrated by the state's delay in bringing this matter before it. However, in light of the amount of work the state needed to do in a relatively short period of time, and in light of the strong public interest in protection from anti-competitive actions, the court declines to apply the doctrine of laches to this motion.

#### All Citations

Not Reported in F.Supp., 1991 WL 47081, 1991-1 Trade Cases P 69,345

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# BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of  
American and English Jurisprudence,  
Ancient and Modern

By

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Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,  
Bankruptcy, Mortgages, Constitutional Law, Interpretation  
of Laws, Rescission and Cancellation of Contracts, Etc.

FIFTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

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1281

**SUBSTITUTED BASIS**

ing in name, form, or shape. *Bedell v. Dictograph Products Co.*, 251 App.Div. 243, 296 N.Y.S. 25, 32; *Freeman v. Altvater*, C.C.A.Mo., 66 F.2d 506, 511.

**Substantial evidence.** Such evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. Under the "substantial evidence rule," reviewing courts will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision. *Marshall v. Consumers Power Co.*, 65 Mich.App. 237, 237 N.W.2d 266, 280.

Substantial evidence is evidence possessing something of substance and relevant consequence and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. *State v. Green*, 218 Kan. 438, 544 P.2d 356, 362. Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. *Marker v. Finch*, D.C.Del., 322 F.Supp. 905, 910. For purposes of considering sufficiency of evidence in criminal case, "substantial evidence" means evidence from which trier of fact reasonably could find issue in harmony therewith. *Kansas City v. Stamper*, Mo.App., 528 S.W.2d 767, 768.

Under the substantial evidence rule, as applied in administrative proceedings, all evidence is competent and may be considered, regardless of its source and nature, if it is the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion." In other words, the competency of evidence for purposes of administrative agency adjudicatory proceedings is made to rest upon the logical persuasiveness of such evidence to the reasonable mind in using it to support a conclusion.

**Substantial justice.** Justice administered according to the rules of substantive law, notwithstanding errors of procedure. *Interstate Bankers Corporation v. Kennedy*, D.C.Mun.App., 33 A.2d 165, 166.

**Substantially.** Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially. *Gilmore v. Red Top Cab Co. of Washington*, 171 Wash. 346, 17 P.2d 886, 887.

**Substantial performance.** Exists where there has been no willful departure from the terms of the contract, and no omission in essential points, and the contract has been honestly and faithfully performed in its material and substantial particulars, and the only variance from the strict and literal performance consists of technical or unimportant omissions or defects. Substantial performance of a contract is shown when party alleging substantial performance has made an honest endeavor in good faith to perform his part of the contract, when results of his endeavor are beneficial to other party, and when such benefits are retained by the other party; if any one of these circumstances is not established the performance is not substantial, and the party has no right of recovery. *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 194 Neb. 473, 233 N.W.2d 299, 301. Equitable doctrine of "substantial performance"

protects against forfeiture for technical inadvertence or trivial variations or omissions in performance. *Sgarlat v. Griffith*, 349 Pa. 42, 36 A.2d 330, 332.

**Substantiate** /səbstənshiyēt/. To establish the existence or truth of, by true or competent evidence, or to verify. *State v. Lock*, 302 Mo. 400, 259 S.W. 116, 120; *Graves v. School Committee of Wellesley*, 299 Mass. 80, 12 N.E.2d 176, 179.

**Substantive.** An essential part or constituent or relating to what is essential. *Stewart-Warner Corporation v. Le Vally*, D.C.Ill., 15 F.Supp. 571, 576.

**Substantive due process.** Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action. *Babineaux v. Judiciary Commission*, La., 341 So.2d 396, 400. See **Due process of law**.

**Substantive evidence.** That adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (i.e., showing that he is unworthy of belief), or of corroborating his testimony. See also **Substantial evidence**.

**Substantive felony.** An independent felony; one not dependent upon the conviction of another person for another crime.

**Substantive law.** That part of law which creates, defines, and regulates rights, as opposed to "adjective or remedial law," which prescribes method of enforcing the rights or obtaining redress for their invasion. That which creates duties, rights and obligations, while "procedural or remedial law" prescribes methods of enforcement of rights or obtaining redress. *Kilbreath v. Rudy*, 16 Ohio St.2d 70, 242 N.E.2d 658, 660, 45 O.O.2d 370. The basic law of rights and duties (contract law, criminal law, tort law, law of wills, etc.) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc.).

**Substantive offense.** One which is complete of itself and not dependent upon another. *U. S. v. Martinez-Gonzales*, D.C.Cal., 89 F.Supp. 62, 64.

**Substantive rights.** A right to the equal enjoyment of fundamental rights, privileges and immunities; distinguished from procedural right.

**Substitute, n.** /səbstət(y)üwt/. One who or that which stands in the place of another; that which stands in lieu of something else. A person hired by one who has been drafted into the military service of the country, to go to the front and serve in the army in his stead.

**Substitute, v.** To put in the place of another person or thing; to exchange. *Toledo Edison Co. v. McMaken*, C.C.A.Ohio, 103 F.2d 72, 75.

**Substituted basis.** In taxation, the basis of the value of an asset determined by reference to the basis in the hands of a transferor, donor or grantor or by reference to other property held at any time by the person for whom the basis is to be determined. I.R.C. § 1016(b).

H.R. REP. 94-499(I), H.R. REP. 94-499, H.R. Rep. No. 499(I), 94TH Cong.,  
2ND Sess. 1976, 1976 U.S.C.C.A.N. 2572, 1975 WL 12520 (Leg.Hist.)

**\*\*2572 P.L. 94-435**, HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

House Report (Judiciary Committee) No. 94-499(I),  
Sept. 22, 1975 (To accompany H.R. 8532)  
House Report (Judiciary Committee) No. 94-499(II),  
Nov. 4, 1975 (To accompany H.R. 8532)  
House Report (Judiciary Committee) No. 94-1343,  
July 15, 1976 (To accompany H.R. 13489)  
House Report (Judiciary Committee) No. 94-1373,  
July 28, 1976 (To accompany H.R. 14580)  
Senate Report (Judiciary Committee) No. 94-803,  
May 6, 1976 (To accompany S. 1284)  
Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE  
House March 18, August 2, 24, September 16, 1976  
Senate June 10, September 8, 1976

House bill H.R. 8532 was passed in lieu of the Senate bill. The House Reports are set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

#### HOUSE REPORT NO. 94-499(I)

Sept. 22, 1975

\*1 The Committee on the Judiciary, to whom was referred the bill (H.R. 8532), to amend the Clayton Act to permit State attorneys general to bring certain antitrust actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

\* \* \* \*

#### \*3 I. PURPOSE

The purpose of H.R. 8532 is to provide a new federal antitrust remedy which will permit State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. The bill is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations.

#### II. SUMMARY OF REPORTED BILL

The first section establishes the bill's short title.

Section 2 contains the parens patriae provisions to be added as new sections of the Clayton Act ([15 U.S.C. 12 et seq.](#)). Proposed section 4C(a) authorizes State attorneys general to sue for damages on behalf of natural persons who have been injured by antitrust violations. Section 4C(b) authorizes the conversion of 4C(a) actions into class suits **\*\*2573** under certain circumstances. Section 4C(c) requires that individuals on whose behalf parens patriae suits are brought be notified. Section 4C(d) provides an opportunity for individuals to exclude their claims from parens patriae suits. Section 4C(e) requires court approval of settlements of parens patriae cases. Section 4D provides that, in parens patriae cases and other antitrust class suits, damages may be proved and assessed in the aggregate by reasonable methods of estimation. Section 4E requires the opportunity for individuals to secure their appropriate share of the damages recovered, with any amount remaining to be distributed as the

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court directs. Section 4F(a) requires the U.S. Attorney General to notify appropriate State attorneys general of their entitlement to bring parens patriae cases. Section 4F(b) requires the U.S. Attorney General to make investigative materials available to State attorneys general in parens patriae cases.

Sections 3(1) and 3(2) amend existing sections of the Clayton Act to include parens patriae actions in that Act's statute of limitations and provision for tolling the statute of limitations, respectively. Section 3(3) amends the Clayton Act to require that plaintiffs who prevail in antitrust injunction cases be awarded reasonable attorney's fees.

### III. BACKGROUND

The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs. It is also true of other antitrust violations such as monopolization, attempts to monopolize, group boycotts, division of markets, exclusive dealings, tie-in arrangements, and conspiracies to limit production. All of these violations are likely to cause injuries to \*4 consumers, whether by higher prices, by illegal limitation of consumer choices, or by illegal withholding of goods and services. Moreover, antitrust violations almost always contribute to inflation. They introduce illegal and artificial forces into the market place, thus undermining our economic system of free enterprise.

Frequently, antitrust violations injure thousands or even millions of consumers, each in relatively small amounts. Indeed, many of the Justice Department's recent prosecutions have involved price-fixing of consumer goods on a local or regional basis. In the food industries alone, the Justice Department's cases have included price-fixing prosecutions involving bread and bakery products in the Philadelphia area, milk in Wyoming, dairy products in Colorado, Utah and Idaho, bread and bakery products in Baltimore and the Eastern Shore area of Maryland, milk in Washington and Alaska, soft drinks in Tulsa, bread in New York and Chicago, baking companies in San Diego and Louisiana, and sugar refiners nationally.

Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. This lack of an effective consumer remedy sometimes results in the unjust enrichment of antitrust violators \*\*2574 and undermines the deterrent effect of the treble damage action. H.R. 8532 fills this gap by providing the consumer an advocate in the enforcement process-- his State attorney general.

During the Subcommittee's hearings in the 93d Congress, Assistant Attorney General for Antitrust, Thomas Kauper outlined the problem in this way:

There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hard-core per se offenses. This damage remedy has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimant less likely to have either the sophistication or resources necessary to prosecute their individual claims.

\* \* \* \*

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be most likely to escape the penalty of

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the loss of illegally-obtained profits. \*5 Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers.<sup>1</sup>

Under the well established doctrine of parens patriae, States have successfully sued to halt continuing wrongs which injure or threaten to injure their citizens. The Clayton Act has been interpreted by the Supreme Court as authorizing States to maintain parens patriae lawsuits to enjoin violations of the antitrust laws when those violations are injuring the State's citizens. In [Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 \(1945\)](#),<sup>1a</sup> the Court said that the State 'as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.'

However, when the State of California recently tried to sue to recover monetary damages on behalf of persons who had allegedly been injured by the price-fixing of snack foods, the Ninth Circuit Court of Appeals held that parens patriae damage actions were not authorized by the Clayton Act. In large part, H.R. 8532 is a response to that case \*\*2575 and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries.

An extremely important benefit which would flow from H.R. 8532 is the promotion of cooperation in antitrust enforcement between the States and the federal government. As Federal Trade Commission Bureau of Competition Director James Halverson put it during the Subcommittee's hearings this year:

There are certain violations of the federal antitrust laws which would be handled more efficiently by a parens patriae suit for damages than by a federal criminal proceeding or action for injunctive relief. An example of such a situation might be where a regional seller of consumer goods has recently discontinued anticompetitive practices that directly injured his customers. The best deterrent to a resumption of the illegal conduct might be a suit by the state which deprives the violator of the profits gained from his bad conduct and provides relief which compensates the injured consumers.<sup>2</sup>

A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.

#### **\*6 IV. THE CONSUMER PRESENTLY HAS NO PRACTICAL MEANS OF REDRESS**

Section 4 of the Clayton Act, [15 U.S.C. 15](#), provides a private cause of action for treble damages, costs and attorneys' fees for 'any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws.'

Under this section, a State may sue to recover damages it has sustained in its capacity as a proprietor or purchaser of goods and services.<sup>3</sup> Likewise, under Sec. 4A of the Clayton Act, [15 U.S.C. 15a](#), the United States may sue whenever it is injured in 'its business or property.' Neither the United States nor any State, however, may presently sue for damages in a representative capacity on behalf of injured citizens unless it has been injured in the same manner.

The impact of this legislative omission on effective antitrust enforcement has become clear in recent years as a result of developing judicial decisions. Under Sec. 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action.<sup>4</sup> In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question. If, for example, a price-fixing conspiracy results in an overcharge of a dollar on a relatively low priced consumer item, and 50 million such items are sold, the aggregate impact of the conspiracy upon consumers and the illegal profits of the price-fixers are not insignificant-- at least \$50 million.<sup>5</sup> Yet no

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single \*\*2576 consumer could practically be expected to bring suit. He would have no investigative resources-- or incentive-- to discover the conspiracy; should he become aware of the overcharge, he will almost certainly have no proof that he purchased the item at a particular time, place, and price; he will quite obviously have neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover his tiny individual stake.

Attempts to use the revised class action provision of the 1966 amendments to [Rule 23 of the Federal Rules of Civil Procedure](#) to fashion a mechanism for consumer redress in this situation have been disappointing. Many courts have found that large consumer classes predicated upon small individual claims present insurmountable problems of 'manageability' in the conduct of the litigation.<sup>6</sup> These manageability problems include proper notice the complexity of evidentiary \*7 issues, and distribution of any recoveries. In *Eisen v. Carlisle & Jacquelin*, the Supreme Court interpreted [Rule 23](#) to require class action plaintiffs to provide individual prelitigation notice to all identifiable members of the class regardless of the cost of providing such notice. In the 1975 hearings, the Director of the FTC's Bureau of Competition, James Halverson, explained that:

The practical effect of Eisen is to eliminate the [Rule 23](#) class action as a feasible means for recovery by a large class of individuals each of whom has sustained relatively minor damages. In situations where the cost of giving notice to the class are much greater than any individual class member's stake in the outcome of the action, it is unlikely that any suit will be brought. The person who deals in certain types of consumer goods, where each transaction may involve only a few dollars, can not fix prices, relatively free from the fear of substantial treble damage actions.

A description of the facts in Eisen will indicate where the Supreme Court's decision has left the consumer class action. The plaintiff, in Eisen, who claimed personal damages of only \$70, sought to represent a class of as many as 6 million persons who allegedly were injured as a result of violations of the antitrust and securities laws. It was calculated \*\*2577 that the cost of giving individual notice to all identifiable members of the class would be about \$315,000. The Court, in ruling that the plaintiff must give such notice, explicitly recognized that its decision sounded the death knell for Eisen's class action because the plaintiff was unlikely to expend \$315,000 to proceed with a suit in which he had a stake of only \$70. The immediate result was that the defendants retained the profits from their allegedly illegal activities.<sup>7</sup>

At a minimum, the new emphasis on the intricacies of class actions has simply added another round of expensive and delaying litigation on the very propriety of the validity, and therefore certification, of the class.

Individual suits and class actions have worked far better for business entities than for consumers injured by antitrust violations. Wholesalers and retailers purchasing from price-fixing manufacturers will frequently buy in sufficient volume to give them a substantial incentive to sue. They maintain accurate purchase records which may be used as proof of purchase, and they will usually have access to attorneys and other resources for investigating the facts and prosecuting the litigation. Their numbers will be smaller, and ordinary business records and the records of trade associations will frequently ease the problem of identifying claimants, so that they will not face many of the obstacles encountered by consumers in class action litigation.

The result has been relatively effective antitrust enforcement where the violation has occurred high up in the chain of distribution, and where the impact has been upon other business entities. Where, however, wholesalers and retailers have passed on all or most of the cost of a violation to the consumer, or where the violation itself occurred at \*8 the retail level (thus subjecting the consumer to the major impact of the violation),<sup>8</sup> adequate enforcement mechanisms simply do not exist. The consumer, who benefits from the proper functioning of our free enterprise system with appropriate antitrust enforcement, has been without an effective method of redress of his grievances.

Frustrated by this gap, the State of California brought an action on behalf of its 20 million purchasers of snack foods, claiming they had been the victims of a price-fixing conspiracy and seeking to represent their interest in court. The Ninth Circuit Court of Appeals held in [California v. Frito-Lay](#), 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973,<sup>8a</sup>) that California could not maintain such a 'parens patriae' action for its injured and legally helpless citizens. The court applauded the State's imaginative

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approach to an obviously important problem, but held that, under the law, California could not recover damages on behalf of its citizens under the Clayton Act. Legislative action was needed, the court said, to enable the State to represent its injured citizens:

The State most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the State is on the track of a suitable answer (perhaps the most suitable yet proposed) **\*\*2578** to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution.

However, if the State is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf.<sup>9</sup>

H.R. 8532 is a response to the judicial invitation extended in Frito-Lay. The thrust of the bill is to overturn Frito-Lay by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under [Rule 23](#).

Support for these legislative goals was expressed in hearings by every witness before the subcommittee, including some who opposed substantial portions of earlier versions of the bill. The bill as reported by the committee is supported by the Department of Justice and the Acting Director of the Bureau of Competition of the Federal Trade Commission, and, generally, by the National Association of Attorneys General.

## V. THE PROVISIONS OF H.R. 8532

H.R. 8532 employs an ancient concept of our basic English common law-- the power of the sovereign to sue as *parens patriae* on behalf of **\*9** the weak and helpless of the realm-- to solve a very modern problem in antitrust enforcement. This doctrine is also firmly embedded in American jurisprudence. Since 1900 the Federal courts have expanded the power of a State to sue 'in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them.'

<sup>10</sup> The *parens patriae* doctrine already applies to antitrust injunction cases. H.R. 8532 extends the doctrine to permit States to protect their citizens by suing for damages when they are injured by antitrust violations. The following is a discussion of individual sections of the Bill.

### SUBSECTION 4C(a)

This is the heart of H.R. 8532. It permits a State attorney general to bring *parens patriae* actions for treble damages 'on behalf of natural persons residing in such State injured by any violation of the antitrust laws.'

The subsection creates no new substantive liability. Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised. Subsection 4C(a) thus provides an alternative means to make practically available Federal remedies at law, previously denied, for the vindication **\*\*2579** of existing substantive claims. It authorizes State attorneys general to sue for damages on behalf of injured persons, subject to the other provisions of the bill, namely, (1) the right of individuals to opt out under section 4C(d), (2) the extinction of the individual's right to maintain his own suit if he does not opt out, and (3) the right of the individual to receive his appropriate share of any recovery.

The establishment of an alternative remedy does not increase any defendant's liability. To the extent an antitrust violator was liable to an individual, H.R. 8532 would make the violator liable to either the individual or the State. The likelihood of

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a financial recovery against an antitrust violator, however, is significantly increased because H.R. 8532 creates an effective remedy where none existed before.

The subcommittee and the full committee gave extended consideration to the proper scope of the remedy. The original bill before the subcommittee, H.R. 38, would have permitted actions on behalf of ‘citizens’ injured by antitrust violations. The subcommittee also considered using the terms ‘person’ and ‘consumers’; it concluded that ‘persons’ was too broad a term as it might be construed to include business entities, which are able, in general, to fend for themselves. On the other hand, the term ‘consumers’ was considered potentially too narrow and too prone to definitional problems.

The committee chose ‘natural persons’ as the best expression of the goals of the legislation. The term is intended to exclude business entities such as corporations, partnerships and sole proprietorships. While some ‘natural persons’ might be in a position to bring their own actions and some business entities might not, the committee concluded that these instances will be rare and that use of the phrase ‘natural persons’ will permit actions on behalf of those most in need **\*10** of representation but presently unrepresented. Moreover, the ‘opt-out’ provision of subsection 4C(d) will preserve the separate law suit of any ‘natural person’ who does not want the State attorney general to pursue his claim.

Under H.R. 8532, parens patriae actions may be maintained to recover damages for any antitrust injuries, except those resulting from violations of section 2 (price discrimination) and section 7 (anticompetitive mergers) of the Clayton Act. The Assistant Attorney General recommended that these sections not be included, and the committee agreed that they are not appropriate for parens patriae actions.

State attorneys general may retain outside private counsel to assist in the prosecution of parens patriae cases. Private counsel may be especially necessary and useful when there is multistate litigation since private counsel may be better able to coordinate such litigation than any individual State attorney general. Private counsel may not, however, be retained or employed on a contingency fee basis under the committee's bill, because the committee felt that States should be encouraged to develop their own in-house antitrust capability.

#### SUBSECTION 4C(b)

Subsection 4C(b) provides the courts with a flexible alternative to the parens patriae action in those rare instances where a different approach **\*\*2580** is necessary to the efficient conduct of litigation. Under this section the court is empowered, on its own motion or that of any party, to order that an action originally filed as a parens patriae action be maintained as a class action. The attorney general may then represent an appropriate class or classes, regardless of whether he himself is a member of that class or of those classes.

Under the existing class action enforcement scheme, the courts have been reluctant to permit State attorneys general to act as representatives of classes of injured consumers, unless their States, or subdivisions thereof, have been injured in the same way as the other members of the class.<sup>11</sup> At one level, Sec. 4C(b) reflects the committee's disapproval of this unnecessarily narrow approach to the issue of adequate representation in antitrust class actions.<sup>12</sup>

The Judiciary Committee recognized that there may be occasions when extensive investigations and pretrial proceedings and the interests of all parties involved convince the court that, in the interests of justice, an action which was brought as a 4C(a) parens patriae lawsuit should be transformed to and maintained as a class action. It might, for instance, be fairer to all parties for the court to order that a parens patriae action become a 4C(b) action when both businesses and natural persons have been injured in exactly the same manner. Conversion to a 4C(b) action would be inappropriate except where the interests of justice would be served thereby. And it would clearly be inappropriate for a court to convert a 4C(a) action into a **Rule 23** class action and, then, dismiss the case on grounds of unmanageability under Rule 23.

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**\*11** If a case is converted to a Sec. 4C(b) class action, the provisions of Secs. 4C(c), 4C(d), 4C(e), 4D, 4E, 4F(b), and 4G apply, even though they may be inconsistent with the provisions of Rule 23. ‘Adequacy of representation’ may be an issue in Rule 23 actions because of the possibility that the representative may have a conflict of interest or otherwise be inadequate. No such issue should arise in parens patriae cases under section 4C(a) or 4C(b), however, absent extraordinary circumstances involving a particular State attorney general.

Subsection 4C(b) is designed to give the courts maximum flexibility to structure individual and consolidated actions to achieve the goal of full and fair adjudication of claims under the antitrust laws.<sup>13</sup> It will permit the courts to utilize the services of the attorney general in a broad representative capacity in those few cases where the parens patriae action would be clearly inappropriate.

The committee is clear in its preference for parens patriae actions under section 4C(a). One of the subsidiary purposes of H.R. 8532 is to avoid, in consumer actions, the cumbersome litigation of peripheral issues which under Rule 23 has sometimes become more time-consuming and costly than litigating the merits of the case. Only where some positive impediment to the maintenance of a parens patriae action exists should a court have to resort to the alternative provided by section 4C(b).

#### **\*\*2581 SUBSECTIONS 4C(c) AND 4C(d)**

Subsections 4C(c) and 4C(d) must be read together; they are designed to protect the constitutional due process rights of each individual potential claimant and defendant.

The constitutional concept of due process in a civil case embodies at a minimum two components: notice that a court is about to take action which may affect a person's interests, and an opportunity to be heard in defense (or prosecution) of that interest.

<sup>14</sup> At the same time, a defendant who litigates a case against a case against a person who purports to represent a particular class has a strong interest in being able to enforce the result against and avoid relitigation with any person who was supposedly represented in the action. That interest is given effective recognition in the legal doctrines of res judicata and collateral estoppel.

Subsection 4C(c) and 4C(d) serve these constitutional interests by providing all potential claimants in the parens patriae action with adequate notice that their interests are to be adjudicated and an opportunity to be heard in vindication of those interests. Simultaneously, they allow a defendant to plead the result as res judicata against all those represented by the State attorney general.

Under Sec. 4C(c), the attorney general in a parens patriae action is required to cause ‘notice thereof to be given by publication in accordance \*12 with applicable State law or in such manner as the court may direct: except that such notice shall be the best notice practicable under the circumstances.’

The subsection reflects a committee preference for notice by publication in all cases where such notice would adequately serve the constitutional and other interests at stake. ‘Publication’ should, of course, be taken in modern context to include employment of media such as radio and television, as well as traditional newspaper advertisement.<sup>15</sup> When there is no applicable State law, or where the manner of publication provided by State law would, in the court's judgment, be insufficient, the court should determine the method of publication.

The statutory preference for publication is qualified by the proviso that whatever form of notice adopted should be ‘the best notice practicable under the circumstances.’ This language is taken from Rule 23 and from major Supreme Court decisions under the due process clause. These decisions require the court to engage in a delicate balancing process to determine what is the ‘best notice practicable under the circumstances.’ This balancing test cannot be reduced to any specific written formula, but a few of the underlying principles are worth mentioning. Where the number of potentially affected parties is large \*\*2582 and individual interests are small or remote, or where names and addresses are difficult or impossible to obtain, the due process clause does not

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rigidly require individual written notice of the litigation to be sent to each.<sup>16</sup> Moreover, where the requirement of individual written notice would frustrate a major legislative or judicial policy, that countervailing policy is entitled to considerable weight in the determination whether publication notice will suffice.<sup>17</sup>

In light of these factors and the historically fluid nature of due process requirements, the committee believes that the imaginative use of publication notice will suffice in the vast bulk of parens patriae antitrust suits. The numbers of potential claimants will frequently be very large, the absence of documented proof of purchase will make identification of individual claimants in many instances difficult or impossible and publication through newspapers, radio and television will frequently quite literally be ‘the best notice practicable.’ At the same time, the strong public interest in enforcement of the antitrust laws against those who have injured large numbers of consumers would be frustrated by a rejection of publication notice in favor of something economically or otherwise impracticable. Only in extraordinary circumstances where publication notice would be manifestly unfair should courts require more.

Subsection 4C(d) provides that any person may exclude his claim from the parens patriae action by filing notice of intent to do so within 60 days after notice has been given. Failure to file such a notice of intent to exclude himself within the given time will result in a potential \*13 claimant being bound by the result in the parens patriae case, absent a showing of good cause for his failure. If an individual opts out, he may bring his own action under existing law.

Thus subsection 4C(d) provides protection for the potential claimant's interest in prosecuting his own action. At the same time it safeguards the res judicata rights of defendants against claimants who fail to come forward and exclude themselves from the representational action. In this regard it protects the right of a defendant to avoid duplicative liability.

#### SUBSECTION 4C(e)

Under [Rule 41 of the Federal Rules of Civil Procedure](#) parties to litigation are ordinarily allowed to dismiss or compromise the action without court approval. In [Rule 23](#) class actions, however, settlements require court approval, which is intended to offer protection to the class members. Under Sec. 4C(e) of the bill, dismissal or compromise of a parens patriae action without the approval of the court is likewise prohibited. moreover, where an action is dismissed or compromised, notice \*\*2583 must be given ‘in such manner as the court directs,’ thus allowing dissatisfied claimants to object to the proposed settlement.

The committee views this section as an important safeguard for consumers in the event an attorney general seeks to terminate a parens patriae action by settlement.

Subsection 4C(e) serves a special prophylactic function, to protect members of the class from unjust or unfair settlements should their champion become fainthearted or inadequate in his representation. This section is intended to promote public confidence in the settlements of parens patriae cases by requiring court approval. As under [Rule 23](#), it will be incumbent on the courts to consider carefully any proposed settlement and to approve that settlement only if it is fair and reasonable and in the interests of justice.

#### SECTION 4D AND 4E

These two sections deal with the measurement and distribution of damages once liability has been established. They must also be viewed and understood as a unit. Section 4D provides that a State attorney general may prove the damages suffered by a given class in the aggregate by statistical or other reasonable methods of estimation. Section 4E provides that any amounts left over after the satisfaction of individual claims shall be distributed as the court may direct. These sections address another major difficulty in the emerging [Rule 23](#) case law. The potential difficulties of computing and distributing damages large classes of persons have led a number of courts to refuse to certify actions under [Rule 23](#) on the grounds that they would be unreasonable.<sup>18</sup>

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The fundamental premise of sections 4D and 4E with regard to the measurement, assessment and distribution of damages is that the antitrust laws should, at a minimum, provide an effective means whereby a plaintiff or plaintiff class can force a guilty defendant to part with \*14 all measurable fruits of his illegal activity as it relates to the plaintiff, multiplied threefold to reflect the factor Congress has determined is necessary as a punishment, as a deterrent, and as an incentive. This premise is in full accord with established concepts of damages under the antitrust laws. The cases reiterate that defendants must disgorge ill-gotten gains;<sup>19</sup> and the standard rules for measuring damages allow a reasonable estimate thereof once the fact of injury has been established.<sup>20</sup>

Section 4D draws upon this established body of law by permitting a reasonable estimation of the amount of damage to the class as a whole in a *parens patriae* or Rule 23 antitrust class action. After the violation and the fact of some injury to the class have been proved, Sec. 4D permits the aggregation of the claims and amounts of injury to the members of the injured class without the requirement of separate proof of the fact and amount of injury to each individual member of the class. Questions relating to causation and the fact and amount of injury to a class may require the court to address such questions separately with respect to different groups within the class of natural persons.

**\*\*2584** Section 4D acknowledges the obvious reality that 'it is far simpler to prove the amount of damages to the members of the class by establishing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the defendants.'<sup>21</sup> In a price-fixing case, for example, frequently the only method of determining the total impact of the conspiracy will be to measure total illegal overcharges in defendants' total sales during the relevant period at the artificially high price to members of the injured class. Once this figure has been computed and assessed against the defendants, their real interests in the case is at an end. The question of how the sum assessed as damages should be distributed and employed is one in which the defendants have no interest. Their only proper remaining interest-- their *res judicata* rights-- are fully protected by Sec. 4C(d).

Aggregation of damages, as provided by Sec. 4D, is necessary because the proof of individual claims and amounts would be impracticable and virtually impossible. *Parens patriae* actions will normally be \*15 brought in instances where thousands or millions of consumers have been injured. Few consumers keep receipts for all the goods and services they purchase or use. In fact, individual receipts or records are not available on a great many consumer goods and services. Snack food machines, for instance, do not issue receipts. Without the aggregation provisions of Sec. 4D, antitrust violators would be able to injure most consumers with impunity, even if Sec. 4C(a) *parens patriae* actions were permitted. Section 4D is also necessary to avoid endless trials in which thousands or millions of individuals would have to appear to prove their individual claims and the amounts of their individual injuries. The section is needed to make *parens patriae* cases manageable and effective. It will reduce significantly the time and expense of the parties and it will simplify the job of the court. Section 4D also permits aggregation and estimation of damages in class actions brought by private parties under Sec. 4 of the Clayton Act. In this regard, the section overcomes some problems which have arisen in cases holding that large classes and the difficulties of damage proof render litigation unmanageable.

Section 4D is fair to both plaintiffs and to defendants. It changes the method by which damages are to be measured and assessed, but \*\*2585 the defendant is entitled to a jury trial on the same issues as before. As in other antitrust cases, the pertinent issues of fact in a *parens patriae* case will be whether there was a violation of the antitrust laws, whether that violation caused an injury to the plaintiffs, and what the amount of damage was.

Section 4D does not permit speculative damages, but it does permit-- as the courts have done consistently-- the damages to be estimated reasonably. There is no injustice in permitting aggregation and estimation after the defendant's liability to the class has been established. The courts have long permitted damages to be proved in antitrust cases by a 'just and reasonable estimate of the damages based on relevant data.'<sup>22</sup>

As the Supreme Court put it almost 45 years ago in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)<sup>22a</sup>:

Where the tort itself is of such nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . (T)he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

The committee believes that a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation. This committee emphatically rejects the notion that our constitutional requirements are so rigid that they somehow require that each of millions of potential claimants for individually trivial sums be paraded through the court to prove his personal damages, when the best evidence and often the only appropriate measure of the scope \*16 of the violation is found in the records of the defendants themselves. A number of Federal courts have agreed.<sup>23</sup>

While the premise of Sec. 4D is that defendants should be made to disgorge all measurable profits from an antitrust violation, Sec. 4E, which applies only to parens patriae actions, recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery. Section 4E requires that all potential claimants be given a reasonable opportunity to claim their ‘appropriate portion of the damages awarded less unrecovered costs of litigation and administration.’ once this claims procedure has run its course, Sec. 4E commits the disbursement of the undistributed portion of the fund, which will often be substantial, to the discretion of the court. The funds remaining should be used for some public purposes benefiting, as closely as possible, the class of injured persons.

Section 4E thus adopts a concept developed in highly imaginative fashion by a number of courts over the years. The judicial antecedents of Sec. 4E include cases in which recoveries for illegal overcharges on bus and taxi fares were applied to reduce those fares in future years.<sup>24</sup> and the innovative application of illegal overcharges in the antibiotic drug industry to a variety of programs beneficial to the drug-consuming \*\*2586 public.<sup>25</sup> These include the expansion of State-sponsored health programs, medical research, the training of nurses and paramedical personnel, the staffing of medical and rehabilitation clinics, and other similar programs.<sup>26</sup>

The committee considered and squarely rejected arguments that this method of applying damage recoveries to the general benefit of the injured class is unconstitutional.<sup>27</sup> Once it is acknowledged that the antitrust violator has no constitutional right to retain the profits of his illegal activity, it becomes clear that he has no constitutionally protected interest in how those profits are distributed for the benefit of those whom he has injured. Using the antibiotic litigation example, neither the public nor a person who has been illegally overcharged for his antibiotics receives an unconstitutional ‘windfall’ at the expense of the price-fixer when the fruits of the conspiracy are used to \*17 establish a medical clinic in his neighborhood. The only alternative--retention of the profits by the adjudicated wrongdoer-- is unconscionable and unacceptable.<sup>28</sup>

#### SECTION 4F

Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under Sec. 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential parens patriae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general ‘to the extent permitted by law.’ This means that the files are to be made available except where specifically prohibited.

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

**\*\*2587** Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.

The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

#### SECTION 4G

Section 4G defines the terms used in Secs. 4C, 4D, 4E, and 4F.

The term 'state attorney general' is defined as the 'chief legal officer of a State, or any other person authorized by State law' to bring *parens patriae* actions. Since 'State' is defined to include the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States, it thus includes the Corporation Counsel of the District of Columbia, and it includes any legally appointed special prosecutors.

The committee strongly supports the development of 'in-house' State antitrust capabilities. At the present time, regrettably, only a few States have the staff and financial ability to prosecute protracted antitrust cases without the assistance of retained private attorneys. Especially in consolidated multistate litigation, retained counsel may well be both necessary and entirely proper for *parens patriae* cases.

Nonetheless, the Judiciary Committee believes that certain types of fee arrangements between States and private attorneys may inhibit the development of State antitrust capabilities. The definition of State attorney general, therefore, specifically prohibits *parens patriae* cases **\*18** to be brought by 'any person employed or retained on a contingency fee basis.'

Suits in the name of a State are an exercise of State power. The committee believes that the States should exercise control over the use of State power not only in theory but in fact. If a State attorney general were able to delegate this function to private counsel on a contingency fee basis, the political and financial stake he would experience in otherwise prosecuting the action would be substantially diminished. And thus State power would be exercised without the guarantee of State supervision.

The committee bill excludes the use of fee arrangements whereby a State agrees to pay a private attorney a percentage of the recovery if the attorney wins the *parens patriae* case for the State. H.R. 8532 also prohibits any contracts which make the outside counsel's fee or the amount thereof contingent on the amount, if any, of the recovery or on whether there is a recovery.

The term 'State', as used in proposed Secs. 4C, 4D, 4E, and 4F includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possession of the United States.

As used in the *parens patriae* sections, especially Sec. 4C, the term 'antitrust laws' excludes sections 2 and 7 of the Clayton Act. Section 2 **\*\*2588** is the Robinson-Patman Act, which concerns price discrimination, and section 7 is the section which prohibits mergers which are anticompetitive. Assistant Attorney General Thomas Kauper recommended that these provisions be excluded from the violations for which State attorneys general could recover damages in *parens patriae* actions. The committee believes that evolving standards of damage assessment under these sections are in sufficiently embryonic stages that further evaluation is necessary before permitting statewide actions of a *parens patriae* nature.<sup>29</sup>

Finally, the bill defines the term 'natural persons' so as to exclude sole proprietorships and partnerships. This provision is discussed in connection with Sec. 4C(a).

#### SECTION 3-ADDITIONAL AMENDMENTS TO THE CLAYTON ACT

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

Section 3 of H.R. 8532 amends the Clayton Act's provisions concerning the statute of limitations, tolling that statute during the pendency of Government actions, and the injunction section.

Section 3(1) amends the statute of limitations provision to include parens patriae actions under section 4C within the 4-year statute of limitations.

Section 3(2) conforms the tolling provision of the Clayton Act so that States' rights of action under section 4C will be treated the same as other rights of action for which the statute of limitations is tolled (staved) pending the outcome of antitrust civil or criminal cases brought by the United States.

#### ATTORNEYS' FEES IN INJUNCTION CASES

Section 3(3) of H.R. 8532 provides that in parens patriae injunction cases and in all other private antitrust cases, a prevailing plaintiff shall be awarded reasonable attorneys' fees.

**\*19** The Clayton Act is intended to provide a sufficient incentive for private parties to sue antitrust violators to redress their grievances effectively. That incentive is primarily achieved by permitting a winning plaintiff to recover treble damages for any injuries he has sustained as a result of the defendant's violation of the antitrust laws.

Another significant incentive provided in Sec. 4 of the Clayton Act is the requirement that a losing defendant in a damage case pay for a 'reasonable attorney's fee' for a winning plaintiff. Because antitrust cases are frequently lengthy and complicated, they are normally very expensive for a person to bring and maintain. Attorneys' fees, therefore, comprise by far the largest portion of the legal expenses incurred in maintaining a private antitrust lawsuit. Since the award of attorneys' fees is made in addition to the treble damage award, a prevailing plaintiff is able to pay for the services of his attorney without having to reduce his damage award. The attorneys' fee provision thus preserves the incentive for a private party to file a meritorious lawsuit.

The injunctive provisions of Sec. 16 of the Clayton Act, [15 U.S.C. 26](#), however, are silent on the subject of awarding attorneys' fees to prevailing plaintiffs. Until recently, the U.S. courts of appeals were split [\\*\\*2589](#) over whether attorneys' fees could be awarded in antitrust injunction cases. Such fees were disapproved in [Decorative Stone Co. v. Building Trades Council of Westchester County](#), [23 F.2d 426 \(2d Cir.\)](#), cert. denied, [277 U.S. 594 \(1928\)](#),<sup>29a</sup> but they were approved in [ITT v. General Telephone & Elec. Co.](#), 43 U.S.L.W. 2466 (9th Cir., April 25, 1975).

The issue of attorneys' fees in Sec. 16 injunction cases was apparently disposed of on May 12, 1975,<sup>29b</sup> when the Supreme Court rules in [Alyeska Pipeline Service Co. v. Wilderness Society](#), [95 S.Ct. 1612](#) courts have no power to award attorneys' fees in the absence of specific statutory authority. While Alyeska was not an antitrust case, the principle apparently applies to cases brought under section 16 of the Clayton Act. The court noted in Alyeska that:

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee-shifting in connection with treble damage awards under the antitrust laws is a prime example. 95 S.Ct. at 1624.

Alyeska invited Congress to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy. In the case of Sec. 16 antitrust injunction actions, there is such a compelling public policy to justify the award of attorneys' fees, and Sec. 3(3) of H.R. 8432 provides the specific legislative authority necessary.

The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations. Litigation by 'private attorneys general' for

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. Alyeska, however, has apparently eliminated the possibility that prevailing plaintiffs can recover attorneys' fees in meritorious and \*20 successful injunction cases. As such, Alyeska creates a significant deterrent to potential plaintiffs bringing and maintaining lawsuits to enjoin antitrust violations. Without the opportunity to recover attorneys' fees in the event of winning their cases, many persons and corporations would be unable to afford or unwilling to bring antitrust injunction cases.

Indeed, the need for the awarding of attorneys' fees in Sec. 16 injunction cases is greater than the need in Sec. 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense. Section 3(3) of H.R. 8532, therefore, is intended to reiterate congressional encouragement for private parties to bring and maintain meritorious antitrust \*\*2590 injunction cases. Under this section, a plaintiff who substantially prevails would be entitled to the award of 'reasonable attorneys' fees.'

In addition to private parties, States would be entitled to recover reasonable attorneys' fees whenever they prevail in Sec. 16 cases.

#### VI. COMMITTEE ACTION

In March 1974, during the 93d Congress, the Judiciary Subcommittee on Monopolies and Commercial Law conducted 2 days of hearings on H.R. 12528 and H.R. 12921. Identical bills, H.R. 38 and H.R. 2850, were introduced during the 1st session of the 94th Congress, and the subcommittee held an additional 2 days of hearings in February and March 1975. The subcommittee received testimony from Assistant Attorney General for Antitrust Thomas Kauper, the Federal Trade Commission's Director of the Bureau of Competition James Halverson, National Association of Attorneys General Antitrust Committee Chairman Andrew Miller (attorney general of Virginia), representatives of the attorneys general of Connecticut, New York, Ohio, and California, and representatives of the private antitrust bar and of private industry. In addition, the subcommittee received correspondence or prepared statements from several Members of Congress, a total of 38 State attorneys general, the Mayor of Washington, D.C., the American Bar Association's Section on Antitrust Law, the Chamber of Commerce, the National Association of Manufacturers, the Consumers Union, and other persons and organizations.

In public session on May 7, 1975, after 4 days of marking up H.R. 2850, the Subcommittee on Monopolies and Commercial Law ordered 11 to 2 that the amended version, H.R. 6786, be introduced and reported favorable to the full Committee on the Judiciary. On July 10, 1975, in public session, the subcommittee agreed by unanimous consent to reconsider H.R. 6786, which was then amended. By a 9 to 2 vote, the subcommittee ordered the favorable report of a clean bill, H.R. 8532, to the full Committee on the Judiciary. In public session on July 22 and 24, 1975, the committee considered and amended H.R. 8532, and on July 24, the committee by voice vote ordered that H.R. 8532, as amended, be reported favorably to the House.

#### \*21 VII. INFORMATION SUBMITTED PURSUANT TO RULES X AND XI

##### A

Clause 2(1)(3) of Rule XI is not applicable. Section 308(a) of the Congressional Budget Act of 1974 will not be implemented this year. See last paragraph of House Rept. No. 94-25, 94th Cong., 1st session (1975).

##### B

No estimate or comparison from the Director of the Congressional Budget Office as received.

## C

No related oversight findings or recommendations have been made by the Committee on Government Operations under clause 2(b)(2) of Rule X.

**\*\*2591 D**

Pursuant to Clause 2(1)(4) of Rule XI, the committee believes that H.R. 8532 can be a major force in combating the present inflationary spiral, and can have a significant anti-inflationary impact on prices and costs in the operation of the national economy.

In August of 1974, the Assistant Attorney General in charge of the Justice Department's Antitrust Division estimated that ineffective competition in the Nation's economy was adding \$80 billion annually to prices paid by consumers. An FTC Commissioner estimated that consumer costs rose as much as \$10 billion annually because of price fixing violations alone. The President of the United States, in October, 1974, also recognized and endorsed the anti-inflationary effect of vigorous enforcement of the antitrust laws. In the 93d Congress, the Joint Economic Committee also concluded that it is vitally important to strengthen competition not only to curtail inflation, but also to preserve the free market system itself.

Thus while the precise extent of the inflationary impact of antitrust violations cannot be determined, it is clear that they introduce foreign and artificial forces exerting upward pressure on prices. By providing more effective enforcement of the antitrust laws on a large scale, H.R. 8532 should contribute to a reduction in the level of these forces.

Compensating antitrust victims and preventing violators from being unjustly enriched will not alone reduce consumer prices and combat inflation. But, to the extent that the individual States develop credible antitrust enforcement capabilities, H.R. 8532 will help to convince potential antitrust offenders that violations will not be profitable. The bill gives the States the opportunity to deter future antitrust violations, but the deterrence will depend entirely upon the States' taking advantage of their opportunities to bring *parens patriae* cases. If States use H.R. 8532 responsibly and are able to deter antitrust violations, then H.R. 8532 will have an anti-inflationary impact locally and regionally, at least, by reducing imperfect competition's contribution to inflation.

**\*23 MINORITY VIEWS OF MESSRS. HUTCHINSON, RAILSBACK,  
WIGGINS, MOORHEAD, ASHBROOK, HYDE AND KINDNESS**

In the name of providing a legal remedy to those who, as a practical matter, have none, this bill charges far beyond the mark to impose a mandatory irreducible fine on violators of the antitrust laws. Although this remedy is deemed civil, it partakes of both civil and criminal aspects. In doing so, the remedy fails to meet ordinary standards for civil or criminal remedies. As a civil remedy, the damages paid generally will not be paid to compensate victims for their losses. As a criminal remedy, the damages paid will be a mandatory fine, often astronomical, but irreducible, without regard for the interests of justice in the specific case. In our opinion, this legislative remedy presents the worst of both worlds.

We agree that the bill establishes no new substantive liability. No new antitrust violations are created. However, the bill does establish procedural machinery for the calculation and imposition of damage awards that undoubtedly will revolutionize the law of antitrust damages.

**\*\*2592** It will be said that all this bill does is to allow defendants' current potential liability to become realized, and that to oppose this legislation is, in effect, to oppose the promise of section 4 of the Clayton Act, now over 60 years old. But since the logic of a single idea does not take account of competing ideas, one may by mere logical extensions step over the precipice.

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

This bill does go too far. It is critical to note that this bill operates in an area where the claimants are often nameless, unidentified, unidentifiable, and ignorant of the trivial injury allegedly suffered and ignorant of who inflicted it. Nevertheless, the bill extracts from defendants three times the damages sustained. Why? Because, it is suggested, that's the way it's done in antitrust law.

But the purpose of treble-damage awards in antitrust law as we understand it is to compensate victims for their injury and to provide the incentive for bringing the action. But in the typical case envisioned by this bill-- for example, one involving price-fixing bread-- there is no incentive to bring the case even though treble damages are obtainable and there generally are no provably known victims to compensate. What the treble-damage award really is in this context is punishment.

Although we believe wrongdoers should not be allowed to retain ill-gotten gains, this principle does not compel the imposition of treble damages. It is respectfully suggested that payments exacted from defendants which, as a general matter, will not go to compensate victims for losses and which will be put to some noble purpose at the discretion of the court may be more accurately termed 'fines' than damage awards.

But the fines imposed by this bill-- and this is critical-- may not be imposed commensurate with the interests of justice. The committee **\*24** rejected an amendment that would have permitted the court to take into consideration the 'defendant's degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business and such other matters as justice may require.' Although these actions may be filed on behalf of millions of unknown individuals and involve millions of dollars, the resultant award must be arbitrarily calculated and may not be reduced even if the interests of justice so require.

The imposition of minimum mandatory penalties may have its place in the law, but such penalties are established at the low end of the scale so as to be 'just' in every application. No so with these fines, which may run into millions of dollars. Moreover, such penalties envision a range of choices from which the court, in the interests of justice, might fashion an appropriate penalty. But this bill goes far beyond that. Under this bill once the extent of the injury is shown, the imposition of the fine, both in fact and in amount, is automatic.

It is argued that it is no concern to the defendant to what purpose the award is put after it has paid it. The argument misses the point. It should be of concern to the Congress how necessary it is to inflict possibly astronomical awards, definitionally three times the damage done, when there is no interest among the victims in bringing the case and where there are no provably known victims or only a few able to make claim against the award.

If the purpose is not to compensate in the manner of a civil remedy, it must be to punish and deter in the manner of a criminal penalty. **\*\*2593** But as a criminal penalty, it is harsh and arbitrary. If the major part of an award is committed to the discretion of the court to be used for some related purpose, it is difficult for us to understand how the purpose, to be fashioned by the court after the case is heard, must be satisfied by an amount which is exactly three times the damage proven to have been done by the defendant.

The purpose fashioned by the court will be a public one. For example, it is suggested that in a case involving the price-fixing of drugs, it is appropriate to commit the award to support a drug clinic. But it is patently clear that the needs of the drug clinic do not define the amount of the award. Nor does the need to compensate, nor does the need to provide incentives for enforcement, as stated before.

We believe that the public interest served by the channeling of the award to some analogous purpose must also admit other factors. For example, if the award is such that it will require the defendant to liquidate assets and lay off employees from work, there may be circumstances where the economic well-being of the community should be a matter for the court to consider in determining whether the defendant should be required to pay the full amount.

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

The provisions of the bill treating with the aggregation and distribution of damages are the crux of this legislation. We believe they are the wrong answer to the problem. Beyond that we believe that the bill will be subject to much abuse. By calling on the State attorneys general to champion these antitrust actions, the bill seeks to provide a political incentive for antitrust enforcement in cases where even treble damage awards provide no economic incentive.

We believe that politics and antitrust will not make a happy marriage. The temptations for the politically ambitious to ride into the \*25 public eye as its champion against ‘fat cat’ antitrust violators by filing lawsuits to the sound of political trumpets may be too great. Since antitrust cases take years to complete, the politically ambitious attorney general need not fear the embarrassment of a string of losses. In any event, many of the cases will have been undoubtedly settled because of their adverse publicity and their nuisance value. The bill underscores how quickly we have forgotten the lesson many thought we learned last year that politics and antitrust should not be mixed.

Finally, in our opinion, the committee report foes not correctly describe the notice requirements of the bill. In subcommittee there was substantial debate on the quality of the notice to claimants that should be required. It was recognized that to require only publication notice would certainly streamline the lawsuit, but it was likewise conceded that such a provision without more would be susceptible to constitutional attack on due process grounds in instances where the names and addresses of the claimants were known but where mailed notice-- the best notice practicable-- was not given. Thus in order to insulate the bill from litigation over its procedure and to eliminate the notice issue as a matter of controversy the subcommittee adopted the proviso that the notice had to be the ‘best notice practicable,’ which the committee ratified without further debate. Although the report correctly describes where the phrase is found in the Federal rules of civil procedure and in case law, other language of the report can be fairly read to give this phrase of art a new meaning. The repot suggests that the test for adequacy of notice is not whether it is ‘best’ for the claimants \*\*2594 to be notified but whether it is ‘best’ for the policy of authorizing parens patriae actions against antitrust violators. Such a suggestion is foreign to the intention expressed in adopting the language explained in the report.

For these reasons we respectfully dissent.

EDWARD HUTCHISON.  
TOM RAILSBACK.  
CHARLES E. WIGGINS.  
CARLOS J. MOORHEAD.  
JOHN M. ASHBROOK.  
HENRY J. HYDE.  
THOMAS N. KINDNESS.

**\*27 SEPARATE VIEWS OF MS. JORDAN**

I wholeheartedly support this bill. As a sponsor of the original measure I believe it represents a vital step forward in both general antitrust enforcement and consumer protection.

I am seriously concerned, however, with one amendment adopted by the committee, which may have the effect of undermining a great deal of what the bill is intended to accomplish.

Section 4G, as amended, by its definition of a ‘State Attorney General,’ effectively precludes the States from employing knowledgeable private counsel on the basis of any ‘contingency fee.’

The amendment has, I believe, two laudable purposes, namely to encourage States to develop their own antitrust capabilities and to protect them from potential gouging by lawyers who take cases on a flat percentage fee, thus sometimes winding up with unjustifiable windfall fees.

**H.R. REP. 94-499(I), H.R. REP. 94-499(I) (1975)**

I am in sympathy with both these objectives. Indeed, I would favor an amendment to provide Federal assistance to the States to develop antitrust litigation capabilities. However, I think it is unrealistic to believe that more than a handful of States will be in a position to conduct a significant amount of such litigation on their own in the foreseeable future. And some States will never have the resources or the interest to hire and train the large staffs which antitrust litigation requires.

Thus there will persist for the foreseeable future a critical need to enlist the services of the private bar if the bill is to have any real impact. I am concerned that a flat ban on ‘contingency fees’ will effectively place the services of perfectly ethical and highly knowledgeable attorneys beyond the reach of the States.

Most plaintiff’s antitrust litigation, like most plaintiff’s litigation in general, is conducted presently on a contingent fee basis. Section 4 of the Clayton Act anticipates this. It provides for the court to award a reasonable attorney’s fee to a prevailing plaintiff, in addition to his treble damage recovery. Thus for the most part, lawyers agree to take antitrust cases for plaintiffs in return for whatever fee the court awards them at the successful conclusion or settlement of the action. Without such arrangements, there would be precious little private antitrust enforcement, since few, if any, plaintiffs will be able to pay the normal hourly rate of experienced counsel without regard to the outcome of the case. States, while in a better financial position than **\*\*2595** ordinary private plaintiffs, will likewise be unable in most instances to commit the required sums to a major case in advance, win or lose.

In some instances, contingency fees can involve overreaching. I do not personally approve of arrangements whereby the lawyer receives both the court-awarded ‘reasonable fee’ and a percentage of the recovery on top of that. However, I fear that the committee, by striking at the overreaching may have seriously undermined the entire scheme of treble damage prosecution.

**\*28** At the very best, the amendment adopted by the committee regarding ‘contingency fees’ creates dangerous ambiguities with respect to permissible fee arrangements. It does not specify what contingent elements must be present in order to render an arrangement unacceptable, and it is clear that not all uncertainty as to final amount will render a fee ‘contingent.’ Even where the lawyer is being paid an hourly charge, he will usually have little idea at the outset what his actual fee will be. The committee amendment could, therefore, be open to an interpretation which would salvage fee contracts dependent for their ultimate amount on some unknown element, such as the award of the court at the conclusion of the case. The risk is very great, however, that a court would determine that the arrangement was ‘contingent’ if some element of success-- either at settlement or at trial-- made the difference between a large fee for the lawyer and a low, probably uncompensatory one.

I think that risk is unacceptable, since States are certain to be dependent for many years upon the services of expert private counsel, whom they will be unable to compensate on a hourly basis without regard to the outcome of the case.

There is another vital point at stake. The contingent fee is not merely an honorable means of financing litigation for those who would otherwise be unable to afford it until the award of final judgement. It is also recognized as an important tool for weeding out the frivolous and unmeritorious case on the basis of expert assessment. It is highly unlikely that a lawyer knowledgeable in any field will be prepared to invest large quantities of his own time and effort in a case on the basis that he will be uncompensated unless he obtains a successful result for the client, unless he believes after careful examination that the case has serious merits.

This point is responsive to two concerns which have been expressed by opponents and critics of the bill. Business interests have argued that the enactment of this legislation will bring a plethora of unfounded lawsuits for enormous sums of money, which they will have to defend at great expense. And members of the committee have on several occasions questioned whether the law might not present irresistible temptations to politically ambitious State officials bent on making a reputation without regard to the ultimate disposition of the cases they bring.

Neither of these unfortunate predictions is remotely likely to come true if the economic judgment of the legal experts is invoked in the evaluation of cases through the use of the contingent fee.

Hon. BARBARA JORDAN.

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N1 Hearings on H.R. 12528 and H.R. 12921 Before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary, 93d Cong., 2d Sess., ser. 43, at 27 (1974) (emphasis added) (hereinafter cited as 1974 Hearings).

1a [65 S.Ct. 716, 89](#) .Ed 1051.

2 Hearings on H.R. 38 and H.R. 2850 Before the Monopolies and Commercial Law Subcom. of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 3, at 16 (1975) (hereinafter cited as 1975 Hearings).

3 State and local governmental units have been recognized as ‘persons’ under Sec. 4 and its predecessor for the purpose of bringing proprietarial damage actions since at least 1906. See [Chattanooga Foundry & Pipe Works v. City of Atlanta](#), 203 U.S. 390 (1906) 27 S.Ct. 65, 51 L.Ed. 241.

4 Some courts initially interpreted the Supreme Court’s decision in [Hanover Shoe, Inc. v. United Shoe Mach. Corp.](#), 392 U.S. 481 (1968) 88 S.Ct. 2224, 20 L.Ed.2d 1231, rehearing denied, 87 S.Ct. 64, 393 U.S. 901, 21 L.Ed.2d 188, and [89 S.Ct. 65, 393 U.S. 901, 21 L.Ed.2d 188](#), to limit standing to sue to the first purchaser of a price-fixed product. In Hanover Shoe the Court refused to allow a defendant to escape liability by asserting that his purchaser had passed on any illegal overcharge to the ultimate consumer. A major concern of the Court was to prevent the violator from retaining the ill-gotten gains of his illegal behavior. The Court noted that if the first purchaser was denied standing the ultimate consumers would have neither the incentive nor the ability to bring effective actions for return of the overcharges. [392 U.S. at 494](#).

More recently lower courts have recognized the pro-enforcement thrusts of Hanover Shoe and have held that plaintiffs at lower levels of the chain of distribution may attempt to prove that illegal overcharges were in fact passed on to them. See, e.g., [In re Western Liquid Asphalt Cases](#), 487 F.2d 191 (9th Cir. 1973).

5 The amount of the overcharge, of course, may not represent either the total social cost of the violation or the total of recoverable damages flowing therefrom. See, e.g., [Flintkote Co., v. Lysfjord](#), 246 F.2d 368, 389-90 (9th Cir.), cert. denied, [355 U.S. 835 \(1957\)](#) 78 S.Ct. 54, 2 .Ed.2d 46.

6 See, e.g., [Dodson Stores, Inc. v. American Bakeries Co.](#), 1973-1 Trade Cases, #74,387 (SD.N.Y. 1973) (all purchasers of bread in the New York metropolitan area); [United Egg Producers v. Bauer Int'l Corp.](#), 312 F.Supp. 319 (S.D.N.Y. 1970) (all purchasers of eggs in the United States).

7 1975 hearings, 16.

8 A single antitrust violation, it must be noted, may cause multiple injuries, and each individual or business which is injured in its business or property has a right to recover damages. A violation occurring at the retail level may, in addition to raising consumer prices, injure other retailers who compete with the violators.

8a [93 S.Ct. 2291, 36](#) .Ed.2d 974.

9 [474 F.2d at 777](#).

10 [Georgia v. Pennsylvania R.R.](#), 324 U.S. 439, 443 (1945) 65 S.Ct. 716, 89 .Ed. 1051. For an historical discussion of the parens patriae doctrine in American law, see [Hawaii v. Standard Oil Co.](#), 405 U.S. 251, 257-260 (1972) 92 S.Ct. 885, 31 L.Ed.2d 184.

11 See, e.g., [California v. Frito-Lay, Inc.](#), 474 F.2d 774 (9th Cir.), cert. denied, [412 U.S. 908 \(1973\)](#) 93 S.Ct. 2291, 36 L.Ed.2d 974.

12 As one court put it, ‘it is difficult to imagine a better representative of the retail consumers within a State than ‘State’s attorney general.’ [In re Antibiotic Antitrust Actions](#), 333 F.Supp. 278, 280 (S.D.N.Y. 1971).

13 Once a *parens patriae* action has been converted to a class action under subsection 4C(b), it is not intended to limit in any fashion the existing discretion of the court to define classes and subclasses and to designate appropriate parties to provide adequate representation. To the contrary, the intent is to make clear the breadth of that discretion. Thus the attorney general could, under subsection 4C(b), be designated to act as a representative of a class including business entities, notwithstanding the fact that he could not initially have brought a subsection 4C(a) action on behalf of such entities. Likewise, even though subsection 4C(b) makes it clear that the attorney general or the State need not actually be a member of the class he acts to represent, such membership would not be a disqualification. Thus where the State itself is a purchaser, the attorney general could represent its proprietarial interests and the interests of those of its citizens included in the class designated by the court.

14 See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) 70 S.Ct. 652, 94 L.Ed. 865.

15 See *Nolop v. Volpe*, 333 F.Supp. 1364 (D.S.D. 1971).

16 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950) 70 S.Ct. 652, 94 L.Ed. 865; *Hansberry v. Lee*, 311 U.S. 32 (1940) 61 S.Ct. 115, 85 L.Ed. 22; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) 41 S.Ct. 338, 65 L.Ed. 673; *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314-15 (1972); Comment, 62 Geo.L.J. 1123, 1169, and n. 256 (1974); Note, 87 Harv.L.Rev. 589, 590 (1974).

17 *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971) 91 S.Ct. 780, 28 L.Ed.2d 113, conformed to 329 F.Supp. 844; *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) 85 S.Ct. 1187, 14 L.Ed.2d 62; *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398; *Sniadack v. Family Finance Corp.*, 395 U.S. 337, 339 (Harlan, J. Concurring) 89 S.Ct. 1820, 23 L.Ed.2d 349.

18 See, e.g., *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971).

19 As the Supreme Court put it in a pivotal case:

‘Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be a recovery.

‘The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.’

*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946) 66 S.Ct. 574, 90 L.Ed. 652, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040. See also *Continental Ore Co. v. Union Carbide & Carbon Co.* 370 U.S. 690, 697 (1962) 82 S.Ct. 1404, 8 L.Ed. 2d 777; *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 176 F.2d 594, 597 (2d Cir. 1949); *Banana Distributors, Inc. v. United Fruit Co.*, 162 F.Supp. 32, 46 (S.D.N.Y. 1958), rev'd on other grounds, 269 F.2d 790 (2d Circ. 1959).

20 See e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) 89 S.Ct. 1562, 23 L.Ed.2d 129, on remand 418 F.2d 21, reversed 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, rehearing denied 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552; *Bigelow v. RKO Radio Pictures, Inc.*, supra note 19; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 51 S.Ct. 248, 75 L.Ed. 544; *Eastman Kodak Co. v. Southern Photo Materials Co.* 273 U.S. 359 (1927) 47 S.Ct. 400, 71 L.Ed. 684.

21 *In re Antibiotics Antitrust Actions*, 33 F.Supp. 278, 281 (S.D.N.Y. 1971); see e.g., *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971) 92 S.Ct. 81, 30 L.Ed.2d 115; *Hartford Hospital v. Chas. Pfizer & Co.*, 1971 Trade Case #73,561 (S.D.N.Y. 1971).

22 [Bigelow v. RKO Radio Pictures, Inc.](#), 327 U.S. 251, 264 (1946) 66 S.Ct. 574, 90 L.Ed. 652, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

22a 51 S.Ct. 248, 75 L.Ed. 544.

23 The Seventh Circuit put the matter succinctly:

‘To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit was to prevent.’<sup>24</sup>

[Hohmann v. Packard Instrument Co.](#), 399 F.2d 711, 715, (7th Cir. 1968), quoting [Weeks v. Bareco Oil Co.](#), 125 F.2d 84, 90 (7th Circ. 1941); See [Dickenson v. Burnham](#), 197 F.2d 973 (2d Cir.), cert. denied, 344 U.S. 875 (1952) 73 S.Ct. 169, 97 L.Ed. 678; [In re Antibiotics Antitrust Actions](#), 333 F.Supp. 278, 282, 283, 289 (S.D.N.Y. 1971). See also 1974 Hearings at 29; 1975 Hearings at 17 (testimony of Messrs. Kauper and Halverson).

Statistical and sampling methods are, of course, commonly used in evidence in Federal courts in a variety of contexts. See Manual for Complex Litigation Sec. 2.712 (1973). See also [Brown Shoe Co. v. United States](#), 370 U.S. 294, 339-343 (1962) 82 S.Ct. 1502, 8 L.Ed.2d 510; [United States v. United Shoe Mach. Corp.](#), 110 F.Supp. 295, 305-07 (D. Mass. 1953); [Rosado v. Wyman](#), 322 F.Supp. 1173 (E.D.N.Y. 1970), aff'd 437 F.2d 631 (2d Cir. 1971) (citing numerous cases and other authorities 322 F.Supp. at 1180-81); [Zippo Mfg. Co. v. Rogers Imports, Inc.](#), 217 F.Supp. 670, 680-84 (S.D.N.Y. 1963).

24 See [Bebchick v. Public Utilities Comm'n.](#), 318 F.2d 187 (D.C. Cir.), cert. denied 373 U.S. 913 (1963) 83 S.Ct. 1304, 10 L.Ed.2d 414; [Daar v. Yellow Cab Co.](#), 67 Cal.2d 695, 433 F.2d 732, 63 Cal.Rptr. 224 (1967).

25 [In re Antibiotics Antitrust Actions](#), 333 F.Supp. 278 (S.D.N.Y. 1971).

26 Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., at 343 (1975).

27 Compare [West Virginia v. Chas. Pfizer & Co.](#), 440 F.2d 1079 (2d Cir. 1971), cert. denied 404 U.S. 871 (1971) 92 S.Ct. 81, 30 L.Ed.2d 115 (approving antitrust class action settlement embodying fluid class recovery concept with [Eisen v. Carlisle & Jacqueline](#), 479 F.2d 1005, 1018 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1947) 94 S.Ct. 2140, 40 L.Ed.2d 732 (expressing due process doubts concerning what that court termed ‘fluid class recovery’)).

28 The committee disapproves decisions such as [City of Philadelphia v. American Oil Co.](#), 53 F.R.D. 45 (D.N.H. 1971); [Illinois Bell Tel. Co. v. Slattery](#), 102 F.2d 58 (7th Cir. 1939), and [In re Hotel Telephone Charges](#), 500 F.2d 86 (9th Cir. 1975), in which, if allegations were accepted as true, defendants were permitted to retain millions of dollars in ill-gotten gains because of the apparent difficulties involved in manageability or in devising an equitable scheme for distribution of the overcharges to specific individual claimants. For added insight on the facts involved in the Illinois Bell outcome, see Newberg, Class Action Legislation, 9 Harv.J.Legis. 217, 231 (1972); Comment, 39 U.Chi.L.Rev. 448, 451, & n. 13 (1972); Note, 31 Md.L.Rev. 354, 361, & n. 50 (1971).

29 See [Gottesman v. General Motors Corp.](#), 414 F.2d 956 (2d Cir.), cert. denied, 403 U.S. 911 (1969) 91 S.Ct. 2008, 29 L.Ed.2d 689, rehearing denied 92 S.Ct. 29, 404 U.S. 876, 30 L.Ed.2d 125 (first holding that damages may be recovered under Sec. 7).

29a 48 S.Ct. 530, 72 L.Ed. 1005.

29b 421 U.S. 240, 44 L.Ed.2d 141.

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